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THE  
T R I A L  
OF  
SIR ARCHIBALD GORDON KINLOCH,  
OF GILMERTON, BART.

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*PRICE TWO SHILLINGS & SIXPENCE.*

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THE  
T R I A L  
OF

SIR ARCHIBALD GORDON KINLOCH,

OF GILMERTON, BART.

FOR THE MURDER OF

SIR FRANCIS KINLOCH, BART.

HIS BROTHER-GERMAN.

*Before the High Court of Justiciary on Monday June 29. 1795.*

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TAKEN IN SHORT HAND,—AND CAREFULLY REVISED BY  
THE AGENT AND COUNSEL.

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EDINBURGH:

PRINTED BY C. DENOVAN,  
For JOHN ELDER, No. 9. North Bridge.

1795.



Entered in Stationers Hall:

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THE  
T R I A L  
O F  
SIR ARCHD. GORDON-KINLOCH, BART.

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**T**HE Prisoner was brought to the Bar a little before 10 o'clock.—He was dressed in black; and his demeanour was decent and respectful. He was attended by Sir Foster Cunliffe, Bart. his brother-in-law, and James Wilkie of Foulden, Esq; his cousin-german.

The Judges, in their Justiciary-robcs, preceded by a Macer, bearing the Justiciary Mace, soon after took their places on the Bench in the following order, *viz.*

LORD JUSTICE CLERK,

Lord ESKGROVE,	Lord DUNSINNAN,
Lord SWINTON,	Lord CRAIG.

In support of the Prosecution, appeared

ROBERT DUNDAS, Esq; his Majesty's Advocate,  
ROBERT BLAIR, Esq; Solicitor-General,  
JOHN BURNET, Esq; Advocate,  
Mr HUGH WARRENDER, Agent.

A

For



For the Pannel, appeared

DAVID HUME, Esq;	}	Advocates.
CHARLES HOPE, Esq;		
WILLIAM RAE, Esq;		
DAVID MONYPENNY, Esq;		

Mess. JAMES and CHARLES BREMNER, Agents.

Silence being proclaimed, the Clerk of Court ordered a Macer to call Robert Dundas, Esq; his Majesty's Advocate, for his Majesty's interest, against Major Sir Archibald Gordon-Kinloch of Gilmerton, Baronet; which being done with the usual forms and solemnities, the Lord Justice Clerk desired the Prisoner to attend to the Indictment then to be read.

## INDICTMENT

" SIR ARCH<sup>d</sup>. GORDON-KINLOCH of Gilmerton, Baronet, present Prisoner in the Tolbooth of Edinburgh, You are Indicted and Accused, at the instance of ROBERT DUNDAS, Esq; of Arncliffe, his Majesty's Advocate, for his Majesty's interest, THAT WHEREAS, by the laws of God, the laws of this, and of every other well governed realm, MURDER, more especially when committed by a Brother against a Brother, is a crime of a most heinous nature, and severely punishable: YET TRUE IT IS, AND OF VERITY, That You, the said Sir Archibald Gordon-Kinloch, are guilty actor, or art and part, of the foresaid crime, aggravated as aforesaid; IN SO FAR AS You, the said Sir Archibald Gordon-Kinloch, being, on the 14th day of April 1795, in the house of Gilmerton, belonging to the deceased Sir Francis Kinloch of Gilmerton, Baronet, Your Brother-german, situated in the parish of Athelstonford, and county of Haddington, did, on the night of the said 14th, or early in the morning of the 15th of April 1795, or on one or other of the days or nights of that month, or of the month of March immediately preceding, or of May immediately



immediately following, come down from your bed-chamber in the house of Gilmerton aforesaid, to the parlour or dining-room, where Your said Brother then was, You having, at the time, two loaded pistols some where concealed about Your clothes ; and having soon thereafter left the said parlour or dining-room, and Your said Brother having followed, and being then close by You, the said Sir Archibald Gordon-Kinloch, on the stair leading to the upper apartments, You did then and there Murder the said Sir Francis Kinloch, Your Brother, by wickedly and feloniously discharging one of the said loaded pistols at your said Brother, by which he received a mortal wound ; the ball having penetrated below the point of the sternum or breast-bone, towards the right side : And the said Sir Francis Kinloch having languished in great pain till the evening of the 16th of the said month of April, did then expire, in consequence of the wound given him by You the said Sir Archibald Gordon-Kinloch, and notwithstanding of every medical assistance having been procured.— And You, the said Sir Archibald Gordon-Kinloch, having, upon the 30th day of May 1795, been brought before James Clerk, Esq; Sheriff-depute of the shire of Edinburgh, did, in his presence, emit a Declaration, which was signed by You, the said Sir Archibald Gordon-Kinloch : Which Declaration, together with two small pocket pistols, having the words “ H. W. Mortimer, London, Gunmaker to his Majesty,” marked on the barrel ; as also a pistol-ball, extracted from the body of the said Sir Francis Kinloch ; as also a certificate dated at Gilmerton the 18th of April 1795, and signed “ James Home, Benjamin bell, G. Somner ;” also a letter from the deceased Sir Francis Kinloch to Mr Alexander Frazer, Sheriff-clerk of Haddington, dated 15th of March 1795 ; another letter from the said Sir Francis Kinloch to the said Alexander Frazer without a date, but marked on the back 18th March 1795 ; as also a letter from You the said Sir Archibald Gordon-Kinloch, to the said Alexander Frazer, dated Haddington Jail, 22d day of April 1795 ; another letter from You the said Sir Archibald Gordon-Kinloch to the said Alexander Frazer, dated  
the

the said 22d day of April 1795; and also a letter, dated Edinburgh Jail, 24th April 1795, from You the said Sir Archibald Gordon Kinloch, to the said Alexander Frazer, will all be used in evidence against You, the said Sir Archibald Gordon Kinloch, and will, for that purpose, be lodged in the hands of the Clerk of the High Court of Justiciary, before which you are to be tried, that you may have an opportunity of seeing the same. AT LEAST, time and place above mentioned, the said Sir Francis Kinloch of Gilmerton was Murdered, and You, the said Sir Archibald Gordon Kinloch, are guilty actor, or art and part, of the said crime. ALL WHICH, or part thereof, being found proven by the verdict of an Assize, before the Lord Justice General, Lord Justice Clerk, and Lords Commissioners of Justiciary, You the said Sir Archibald Gordon Kinloch, OUGHT to be punished with the pains of law, to deter others from committing the like crimes in all time coming."\*

*Lord Justice Clerk.* Sir Archibald Gordon Kinloch, Baronet, Are you Guilty or not Guilty?

*Prisoner.* Not Guilty.

After the Pannel had pled *Not Guilty*, Mr DAVID HUME, one of his Counsel, addressed the Court as follows:—

*My Lord Justice Clerk,*

Your Lordships have heard the plea which the pannel enters to the charge,—the grievous and too relevant charge,—which is laid in this (as I must needs admit it to be) most necessary prosecution against him. And it now remains for those who have undertaken the care of his defence, (however unequal to so important a task,) to explain to your Lordships, somewhat more fully than the pannel for himself can be expected to do, the meaning of that plea, in the particular circumstances of this case; and to point out to you the scope and object of the proof in exculpation, which is intended to be taken on his part.

In pleading not guilty to the charge, the pannel would, in the first place, be understood to intimate his denial of *that*, which the prosecutor in support of his libel has to prove, and which, if he cannot prove, he must fail in his prosecution,

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\* Lists of the Witnesses, cited on both sides, will be annexed.

prosecution, namely, That it is He who has been the actor of the miserable deed of slaughter here related;—a thing which, even if it be true, the pannel cannot confess, having scarce any knowledge or remembrance of what passed on the occasion of himself, but from the relation of others only, which does not call for, nor would justify a confession.

But farther, my Lord, and perhaps in this case still more material,—if unluckily it shall appear and be shewn, that the pannel's *hand* has been the unhappy cause of the death of his Brother,—then, my Lord, and in that event, his plea must be understood to mean this other, equally available indeed, but far less fortunate defence, that at least his heart and purpose have not been in the deed, but his hand only,—that it was not the work of malice and design, (without which there is no murder,) but of pure fatality and misfortune, which he could not avoid, and for which he is not the object of punishment, but of sympathy and commiseration:—Because, my Lord, at the time stated in this Indictment, the pannel was no longer to be numbered in the rank of reasonable and accountable beings, but by one of those high and dreadful visitations of Providence, to which we *all*, the wisest and the best of us, are equally liable, and from which even thrones are not exempt, had been deprived of all self-government,—of all regulation of his conduct, or controul of his passions,—of all discernment of friend from foe, or of that which was meant to serve from that which was meant to harm him,—and acted, in short, under the blind impulse of a distempered and furious imagination, which transported him wheresoever it would,—which filled him with a thousand vain jealousies, horrors, and apprehensions,—and would equally have turned his hand against whatsoever person had at that moment come in the way. This, my Lord, is the pannel's plea and main reliance.

My Lord, while I state it for him, I am not ignorant of the reports and rumours that are abroad in the world; rumours, I am sorry to say, which, on the very day preceding this trial, and even from the pulpit, the seat itself of truth and of charity, have, in contempt of decency and humanity,

\* A mistake in point of fact for the Sunday se'night before.

humanity, been industriously circulated to condemn him. I say, I am not ignorant of these reports, and of the weight of prejudice and suspicion, with which, in consequence, I have to struggle; not indeed with your Lordships, whose breasts are void of every feeling of the sort, and who will listen to nothing but the information of the law, and the still voice of your own conscience; but with the people at large, from among whom the persons, who as Jurymen are to decide on the pannel's fate, are and must be taken. Nor, my Lord, do I think it very wonderful, that such should be their feelings on this extraordinary occasion. My Lord, when they are told the miserable story of this event,—that a worthy and excellent gentleman,—the representative of a flourishing and respected family,—just arrived at the possession of his inheritance, in the course of nature, by the death of his aged father, (a father, in good time removed from the sight of such a scene among his children;)—when, my Lord, they are told that this good and estimable person, surrounded with all the fair prospects of a long, a happy and an useful life,—that he has been taken off by a foul Murder,—a murder committed under his own roof, almost at his own table, and in the midst of his domestics, friends and relations; and when to all this it is added, that he has fallen by the hand of his own brother, his guest at the time, and inmate of his house, by him “*who should against the Murderer shut the door, not bear the knife himself:*” No wonder, when this lamentable story is related, if, in the first emotions of pity and of indignation at so sad and strange a tragedy, any thing that *can* be said in defence of the unhappy author of so much mischief, is heard at first with a close heart and an unfavourable ear.

But, my Lord, how natural and how excuseable soever these emotions, (as surely they are *most* excuseable,) they are not, however, the just and proper emotions for this time and occasion; nor is this a disposition which they can be suffered to bring with them into the presence of this Court of Justice; into which, my Lord, they are not called to assuage their passions, or indulge their feelings, with regard to an event,



event, which, however deplorable, is past and gone, and cannot be recalled, (I would it could;) but to try as Judges, coolly and impartially to try, nay scrupulously and tenderly to try, the manner of that calamity, whether it was of chance or of design, and to decide on the life and death of a frail and infirm mortal like themselves, who if, by the will of Providence, he has truly been visited with this grievous and sore affliction, and has been the instrument of destroying a brother, who never did him harm, and whom he never regarded *but* as a brother, is himself far more to be pitied than the deceased, and is no object of judgement, but for that Almighty Judge whose hand hath smitten him. These things, I trust and hope in God, that all now present, and those especially who have been called to the office of Jurymen, will, as they value the interest of justice, or their own peace of mind, remember and keep in view; and that there are no bounds nor measure to the idle, the confident, yet false and groundless stories which a whole country, commenting upon one, and that so marvellous and interesting a subject, must give rise to.

My Lord, I ask your Lordships pardon for just touching on this topic, unnecessary I confess to your Lordships, and to which I shall not again recur. With respect to the proper business before the Court,—in stating the panel's plea in the general terms I have already used, I have perhaps sufficiently complied with the rule of Court, and have stated *that*, which you cannot *but* sustain as a relevant and lawful defence. But, my Lord, from any thing I know of this case, I shall have no objection to lay the state and history of the fact somewhat more fully before the Court; though, on the other hand, it cannot, and I know will not be expected of me, to enter into a disquisition concerning the nature of Madness, (the thing of all others the hardest to be described,) or that I should attempt to ascertain the peculiar class and character of the distemper, to which this unhappy man was liable.

Suffice it to say, that it was no short, sudden, and unaccountable fit of phrenzy, for the first time observed at the  
moment

moment of the slaughter, (though, allow me to observe, even this, if absolutely and fully proved, would in law, as in reason, be sufficient;) but the pannel's plea is far more favourable. Upwards of fifteen years ago, I believe in 1779, when abroad in the West Indies, in the service of his country as an officer, the pannel had the misfortune to be seized with one of those dreadful fevers incident to the climates of that quarter of the world, and which raged with such violence at this time, that out of 5000 men, which composed their little army in the island of St. Lucia, no fewer than 1800 were, in the course of a few months, swept away. After a long and severe illness, and by the pure strength of his constitution, he escaped, my Lord, at last, with his life; but I cannot say, fortunately escaped, for he left the better part of him *behind*; and from thence forward was no longer the man he had been before. Not only, my Lord, was there a great alteration of the temper and humour of the man, who, from social, chearful, and good humoured, became sullen, jealous, and irascible, and extremely changeable and uncertain.—not only was there a decay of the vigour of his intellect—a confusion, weakness, and cloudiness of understanding; but there had come to be at times a plain derangement and disorder—and this to such a degree, as had on one occasion tempted him to turn his hand against his own life, (as he is now charged to have done against his brother's;)—and this an attempt of so violent and serious a nature, (by cutting himself very deeply in the wrist,) as occasioned him a confinement of three months, before he was again fit to come abroad.

This, my Lord, had been his state for years. But of late, and recently before the event which gives rise to this trial, things had plainly been verging, (as happens with this malady,) from worse to worse, into absolute insanity and deprivation of reason. Of which melancholy truth, my Lord, so much were all about him,—so much was the deceased himself convinced, (not to mention the many strong proofs of it that will be given you in his actions and conduct.)



duct,) that every preparation had been made, the strait waist-coat provided, a keeper engaged, and the proper attendants summoned to the house, to reduce him, by main force, into a state of coercion as a *madman*, who could no longer be suffered to go at large.

Happy would it have been for the deceased, happy for the pannel, for the common friends of the family, and for the public, if this salutary, this necessary purpose, had with due dispatch and resolution been carried into effect: For to the undue delay of it, (owing, I admit, to amiable, but most unfortunate motives,) was the catastrophe owing that ensued. Had it not been for that delay, and an awkward and ill conducted attempt in the end to seize his person, at a time, when there was no force at hand to master him, Sir Francis Kinloch might now have been alive, and happy in the midst of his friends;—your Lordships would have been spared this painful piece of duty;—and Sir Archibald Gordon-Kinloch, a gentleman of birth and accomplishments, and born to happier prospects, would not now have stood exposed, a public and miserable spectacle, at the bar of a Court of Justice, and under trial for his life.

My Lord, when I have explained the defence in these terms,—a state of utter insanity, at the time of the deed, and preceded by a course of infirmity and of occasional derangement for years, I trust I have laid a plan before you, which stands in no need of aid from cases, books or precedents, to recommend it to the attention and favour of the Court; nor will I consume one moment of your Lordships time, which, I am afraid, will at any rate be long encroached on, with the quotation of any such, in support of that which nature, reason, and humanity prescribe.

The Court delivered their opinions, which coincided with the proposition of Mr Hume; and the following Interlocutor was pronounced:—

“ The Lord Justice Clerk, and Lords Commissioners of  
 “ Justiciary, having considered the criminal libel, raised

“ and pursued at the instance of Robert Dundas, Esq;  
 “ of Arncliffe, his Majesty’s Advocate, against the said Sir  
 “ Archibald Gordon-Kinloch of Gilmerton, Baronet, they  
 “ find the libel relevant to infer the pains of law; but  
 “ allow the pannel to prove all facts and circumstances  
 “ that may tend to exculpate him, or alleviate his guilt :  
 “ And remit the pannel, with the libel, to the knowledge  
 “ of an Assize.”

The Jury being called, and no objection made to any  
 of them, the following gentlemen were impannelled :—

### THE JURY.

1. Andrew Wauchope of Niddry Marischal, *Chancellor.*
2. John Wauchope of Edmonstone.
3. George Ramsay of Whitehill.
4. Simon Fraser of Ford.
5. Robert Trotter of Castlelaw.
6. John Newton of Curriehill.
7. Alexander Keith of Ravelston.
8. George Ramsay younger of Barnton.
9. James M’Aulay druggist in Edinburgh.
10. Robert Sanderfon merchant there.
11. William Coulter merchant there.
12. Thomas Hutchison baker there.
13. John Moncrieff apothecary there.
14. Patrick Inglis merchant there.
15. Elphinston Balfour bookseller there, *Clerk.*

### EVIDENCE FOR THE CROWN.

1. DUNCAN M’MILLAN, writer in Edinburgh, examined  
 by Mr BURNET.—Were you acquainted with the late Sir  
 Francis Kinloch? I was. Do you remember, on Monday  
 13th of April last, seeing Major, now Sir Archibald Gordon  
 Kinloch? Yes, I came from Edinburgh with Mr Alex-  
 ander Kinloch. Do you remember of meeting a chaise  
 on your road to Haddington? Yes. At what time might  
 this be? Past 3 o’clock in the afternoon. Did you ob-  
 serve who was in the chaise? The prisoner at the bar was  
 in

in it. Did you observe any thing particular in his appearance? He threw himself back, as if wishing to avoid being seen. Did the chaise stop?—No.

*Lord Justice Clerk.* Were you going in opposite directions? Yes.

*Mr Burnet.* Had you any conversation with Mr Alexander Kinloch on this occasion? He expressed surprise, because he thought his brother had gone to London. Did Mr Alexander mention the day that he supposed his brother had gone to London?—No.

You passed on to Haddington? Yes, and stopped at Mrs Fairbairn's. Did you dine at Mrs Fairbairn's?—Yes. Had you any other company?—Yes, Mr George Somner, who dined with us. Did you see Major Gordon-Kinloch there?—I heard the noise of a carriage.—I looked out at the window, and observed that it was the same chaise we had met.—It stopped at Mr Somner's shop.

Did you, or any of the company, go out?—Mr Somner went out, and returned soon after, with Major Gordon-Kinloch. Had you any conversation with the Major?—Yes.—I asked him how he was.—He answered, he was very ill. Did he continue in the room with you, or did he go out? He went out and returned again. How long did you remain in Fairbairn's house, and how did the Major behave when he returned? When he came back, we pressed him to take a glass of wine and water; and he was in so bad a state, that he was not able to carry it to his head.

Did you go to Gilmerton that night? Yes.—Who went along with you? Mr Alexander Kinloch. Had you not occasion to know that another person went along with Mr Somner? Mr Somner and the pannel set out with the intention of going to Gilmerton, as they said. Did they not go forward? The chaise, in which the pannel and Mr Somner were, stopped at a place called *Cock-burd-tail*, about a mile from Gilmerton. We asked them why they stopped? And they said, To make water.

*Lord*

*Lord Justice Clerk.* Mr Somner made the answer? Yes.

*Mr Burnet.* What passed further? After they had stopped a considerable time, I asked What detained them so long? and Mr Somner answered, That the Major had gone away.—Was a postilion sent after him? One of the postilions was sent to look for him: He came back, and informed us, that he had overtaken the Major, who said he was going to Haddington, where he said he would be found. Did you then go on to Gilmerton? Yes, we arrived there a little after ten at night. Did both chaises go on? Both. Do you remember of any thing being taken out of the chaise in which the Major was? I think there were some things taken out, but I was not present.—What happened after your arrival at Gilmerton relating to the Major? Mr Somner came into my bed-room in the morning, told me, that he was going to Haddington to look after the pannel, and desired me to follow him as quickly as I could. You went to Haddington then? Yes, after breakfast, and enquired for the Major, but could get no information of him. Did you go back to Gilmerton that day? Yes, I returned before dinner. Was Sir Francis Kinloch at home? Yes; also Mr Alexander, Miss Kinloch, and a Mr Low.

Do you remember any thing that happened after dinner? I remember there was a message brought to me, that somebody wanted to speak to me.—About what time was this? About half an hour after dinner.—When was dinner? We sat down to dine about five.—Who was the person that wanted you? It was William Reid the gardener?—What passed between you? He told me that he had been up at Mr Walker's of Beanston, and that he had seen the Major there, who was in a very disagreeable situation indeed.—That he went up stairs, and knocked at the door where the pannel was.—That the pannel called out who was there, and the door was half-opened from within.—There was no body in the room but the pannel.—He had a pistol in his hand, which alarmed Reid exceedingly.

*Lord*



*Lord Justice Clerk.* He had a pistol you say?—Yes, my Lord.—This is all that William Reid told me.

*Mr Burnet.* How did you proceed? I called Sir Francis out of the room to inform him; and the pannel appeared soon after.—I observed him, before he came up to the house, from the window of the lobby.—Did he come into the house? Yes, he came into the lobby.—What conversation passed there? Very little.

*Lord Advocate.* Do you recollect any part of that conversation? His brother and I enquired how he did, and he said, Very poorly.

*Mr Burnet.* Do you recollect where he went next? By the desire of Sir Francis, who took him by the arm, he went to his own bed-chamber, and I returned to the dining-room. What happened next? A message was soon after brought to Mr Low, that Sir Francis had been taken very ill, and could do no business that night; upon which Mr Alexander Kinloch left the dining-room, and went up stairs, and shortly after Mr Low went away. Had you occasion to leave the dining-room, and go up stairs? Yes, to the Major's room. What conversation had you with the Major? I do not recollect. Was the Major in bed? He was lying on the bed, and part of his clothes were off. Do you recollect any conversation that passed? The Major spoke, and conversed a good deal with his brother Sir Francis; but I don't recollect the purport of the conversation. How long did you remain in the room? Not long.—I was there occasionally.—The family went to supper about eleven, but the Major did not come down.—Was Sir Francis in the room? Yes.

*Lord Advocate.* You saw the pannel before at Fairbairn's, and afterwards at Gilmerton, Did he appear in a better or worse situation at the latter period than at the former? He appeared a great deal calmer, from the attention of his brother Sir Francis. Do you recollect the substance of what passed in conversation? No. Did he hold any irrational or incoherent conversation, either in your or his brother's presence before supper? I cannot say. Did any thing

thing pass, which impressed your mind at the time, that he was unfit to hold a rational conversation? I did not think him perfectly collected. Was he more or less collected than when you saw him at Fairbairn's? He was more collected.—From what circumstance or appearance did you form this opinion, that he was not perfectly collected? It was from his conversation.—He wandered from topic to topic.

*Mr Burnet.* How long did the company sit at supper? Till three in the morning.—Did any person join them? Yes, Mr George Somner. At what time did he come there? Between 10 and 11. This was before supper? It was. At what time did you go to bed? Immediately after supper. Have you occasion to know, if Sir Francis went to bed then? He left the room before I did go to bed. He had occasionally left the dining-room in order to visit the Major. Did you see him afterwards? I saw him in his bed-chamber before I went to bed. What did you say to him? I advised him to go to bed. How long were you in bed? I was waked by Mr George Somner. (*L. Clerk.* There was only one Mr Somner here? Yes.) What was the occasion of Mr Somner waking you? To tell me that Sir Francis was shot. Where did you go to? Straight to Sir Francis's room. In what situation did you find Sir Francis? The servants were undressing him. Did he speak to you? He told me not to mind him, for there were plenty with him; but to go and prevent his poor sister from coming into the room. Did you see any wound about Sir Francis? I saw a wound, and was desired by Mr Somner to put my hand upon it, to prevent the external air from entering. Did you prevent Miss Kinloch from entering the room? I went immediately to the door, when Sir Francis desired me, but could not prevent her from coming in. She came in, and was very much distracted. Did she remain in the room? No, we were forced to carry her out.—I returned, after seeing Miss Kinloch to her room. Were any expresses sent off? There was an express sent to Edinburgh



burgh for Doctor Monro and Mr Benjamin Bell; and another to Haddington, for Mr Richard Somner.—I then went into the room where Sir Francis was and supported him for half an hour, while Mr George Somner was preparing bandages.

*Lord Advocate.* Did any conversation pass between the deceased and you on the subject of the event that had taken place? None, only he said, “God Almighty help that poor unhappy man.” Did you, in passing from your own apartment to that of Sir Francis, see the prisoner? No, I did not see him again. Was he not on the stairs, nor in the lobby? No. When did Mr Bell arrive? He came about eleven o’clock. Was Sir Francis regularly attended by medical persons? Yes. Had you any farther conversation with Sir Francis? I had some little conversation, but none on the accident, or the person who committed it, except what I mentioned before. How long did Sir Francis survive the accident? The wound was received on Wednesday morning, and he died on Thursday night, about eleven o’clock.—You were intimate in the family of the late Sir David Kinloch, How long did that intimacy continue? From the year 1762. Were you intimate from the year 1780 downwards? Yes.—When did Sir David die? In February last. Was the pannel at that time in the house? Yes. How long did he continue after? I cannot say; I went away. Did Sir Francis ever go from home at any time, and leave his brother, his sister and you, at Gilmerton? Yes. I came into Edinburgh before the Session rose, and before that time, Sir Francis had gone to Edinburgh. Did you remain at Gilmerton during the time of Sir Francis’s absence? Yes. Who acted as landlord then? The Major. During any time previous to the 12th of March, Had you occasion to observe any thing particular in the conduct of the prisoner? Nothing, except that he was dissatisfied with his father’s settlements. Does it consist with your knowledge, that Sir Francis had any particular reason for going to Edinburgh. Yes, it was to take  
the

the advice of counsel on his father's settlements. Do you not know, that it was on account of the dissatisfaction that the pannel had expressed? Yes, from the time that Sir Francis left Gilmerton to go to Edinburgh, till the day that the witness left it also. Did any conversation pass on that topic? Yes. What was the tendency of that conversation? The pannel expressed his dissatisfaction in several conversations. From the year 1780 downwards. Did you observe any thing particular in the conduct of the prisoner? He was remarkable for being exceedingly troublesome when he got drink. Do you recollect any other peculiarity? He was sometimes not correct, not sane. Do you allude to the time he was in liquor or otherwise? He was confined for insanity once in Edinburgh. Do you recollect when? It was a few years ago. Is it from that circumstance, or any other, that you formed your opinion of him being insane? It is from that circumstance, together with other appearances. Of what nature were these other appearances? That of being troublesome in company; and, at a former period of life, he was one of the most mild and pleasant men in company I ever saw. Did you ever observe any appearances, when sober, which could induce you to suppose him insane? I remember once, some years ago, that he came to my bed-side, in my own house, about five in the morning, and said, he was going to set off for Greenock to see Major Mackay.

*L. J. Clerk.* Had he not been in town? No; he had been travelling all night. Was he sober? Yes.

*Lord. Advocate.* Was it from his conversation or appearance that you judged him insane? From both. Did he tell you his purpose in going to visit Major Mackay? No. Nor where he had been? Yes, at Berwick. Did you attempt to dissuade him? Yes. Did he state any reason why he was going to see Major Mackay? None. Did you take any steps in consequence of this? No. Did you ever communicate to his family the opinion you had formed? I think that I must have mentioned to Sir Francis, that I thought him insane.

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Do you know of any cause of enmity, or of any grudge, subsisting between the pannel and his brother? His conduct when in drink was very extraordinary. Do you remember any thing more remarkable than another? I remember very high words passing between them, and the prisoner struck Sir Francis. Did Sir Francis give any cause for this? He certainly was in a great passion. Was there any cause for this passion? The pannel had given great abuse to a gentleman at his father's table, and Sir Francis reproved him for it. He struck him with a glass tumbler, and wounded him upon the face. Were you present at the abuse that had taken place? I was. In your opinion, was the abuse such as to justify Sir Francis for taking his brother to task? I think it was. What happened in consequence? I carried Sir Francis up stairs and dressed him. Sir David was not informed of it then? Not for some time. Does it consist with your knowledge, that the pannel was obliged to leave his father's house on account of this misunderstanding? I think he was. How did Sir Francis take this behaviour? He forgave him. He did not feel any resentment.

During the last years of your acquaintance with the pannel, was he accustomed to leave the house suddenly, without warning, or telling where he was going? Yes. And did he come back, without telling where he had been? Yes. Were any steps taken, or proposed to be taken to confine him? I never heard of any during all this time, till immediately before the present event. I mean till after Sir David's death.

*Mr Burnet.* Had you occasion to know that the Major came to Edinburgh, and resided there some time before his brother's death? Yes. How long before his death? A few days, and he lived in the Black Bull Inn. In what state did he appear? Was he able to converse on general subjects? He was. Do you remember any difference in his appearance from what you had seen at Gilmerton? I thought he had been living harder than usual. Did you observe any other alteration? No.

*Id. Advocate.* You tell us you never knew of any steps being taken to confine him? None, until I went to Haddington. When? On the Monday evening. Was that the first time? Yes. What induced the family to do this? The deranged state he was in. Were any steps actually taken? Mr Somner returned from Gilmerton to Haddington, for the purpose. Was there any preparation made in the course of Tuesday? None, till Tuesday night. The pannel came home about Six, and Mr Somner was sent for about ten; and it was proposed to secure the pannel, but Sir Francis delayed it. Who proposed it? Sir Francis himself proposed it.

DUNCAN M-MILLAN, *cross examined by Mr HUME.*—Deponed, That the pannel, when in Mrs Fairbairn's, attempted to swallow a bit of meat, and could not: That his brother Alexander assisted him to carry the glass to his head, on account of the shaking of his hand: That he was unquiet and restless; kept walking backwards and forwards through the room, and went out to the stable-yard and garden: That he seemed oppressed and unhappy, and hardly joined in the conversation: That he gave no reason for his purpose of going to Edinburgh, nor for returning to Haddington, nor for calling at Mr Somner's: That the agitation of his person, and the shaking of his hand, appeared to the deponent to arise from illness, and not from liquor: That he did not press drinking, or show any desire for it; on the contrary, drank less than others of the company; and that, of course, they would not have assisted him to carry the glass to his head, if they had thought that he had already got more than he was the better of: That Mr Somner gave directions to the hostler to look after him, as appearing to be ill and deranged, and unfit to take care of himself: That on the evening, when the pannel struck his brother, it was after supper, and the bottle had been on the table, and the party drinking from dinner to supper: That, on the evening of Tuesday the 14th, Mr Somner



ner had brought a strait waist-coat with him to be put on the pannel, and a nurse or keeper to attend him.

*Lord Justice Clerk.* You have deponed to various meetings with the pannel before the accident happened, Now, according to best of your judgement, was he in a capacity to know the difference between moral good and evil, and to know that murder was a crime? I cannot say. Say to the best of your judgment? I think he was in a capacity to judge between good and evil.

*Lord Eskgrove.* Had you any reason to believe, that the prisoner was acquainted with the coming of the woman from Haddington? No.

*Mr TROTTER, (one of the Jury),* Did Sir Francis, after coming out of the Major's room, on the night on which the accident happened, speak as if there had been any difference that night between him and the Major? No.\*

GEORGE SOMNER, surgeon in Haddington, *examined by*  
*Mr Solicitor-General BLAIR.*

Were you well acquainted with the deceased Sir Francis Kinloch? Yes. Do you remember of receiving a message from Gilmerton on Monday the 13th of April last? A messenger came from Miss Kinloch, desiring the witness to come immediately and speak to her. I went there about one or two o'clock. What conversation passed betwixt Miss Kinloch and you? It was to prevent Major Kinloch from going to Edinburgh, for she thought him in a very unsettled state of mind, and not fit to undertake the journey. Did you see the Major? I saw him before I saw Miss Kinloch. He was in a post-chaise at the door. He said he was going to town. Did he accordingly set out? Not immediately. I observed him in the chaise very much agitated; and, from his appearance, suspected

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\* It was understood that this, and the five succeeding witnesses, were to be called back, and re-examined at the instance of the pannel; but their exculpatory evidence was ultimately dispensed with.

suspected it to be on his account that Miss Kinloch had sent for me. What conversation had you with Miss Kinloch? She told me that he appeared in a strange situation; that he had come there on the Sunday, with the buckles or strings out of his shoes. What did you say? I told her that, from the observations I had made myself, I concluded him perfectly mad, and that he should not be allowed to go about. What were the circumstances that made you think so? From the appearance of his eye, and the agitation in which he seemed to be. Has it been common for you to attend mad persons? No. What farther passed? I went down stairs to try to stop him from going away. I told him, if he would wait till I got some little refreshment, I would go with him to Haddington. This was the argument I made use of to induce him to come out of the chaise. What did he say to this? That he could not stop, as he would be too late for dinner at Edinburgh; and he accordingly ordered the postilion to drive on, and drove away.

After this, had you any further conversation with Miss Kinloch? Yes. I urged the propriety and necessity of confining him. I told Sir Francis the same thing that I had told Miss Kinloch; and he expressed a desire, that I might follow the Major to Edinburgh, and take the advice of the two Doctors Homes as to what should be done. Did you return to Haddington that night? Yes. And, when I returned there, I received a message from Mr Alexander Kinloch and Mr M<sup>r</sup> Millan, who were at Mrs Fairbairn's, desiring me to go there. I went there, and saw Mr Alexander and Mr M<sup>r</sup> Millan, and told them what had passed at Gilmerton. They told me, that they had met the Major going to Edinburgh. After dinner, Mr M<sup>r</sup> Millan observed the chaise in which the Major was. It was driving as if he had been coming from Edinburgh. We looked to see which way the chaise would go, and it stopped at my shop door. I went down, and asked him to come up to Fairbairn's. He agreed to come. He shook hands with his brother Alexander, saying, he was very ill, and would never be better. He then walked about the room in great



great agitation, and shaking his head ; and he afterwards left the room. Did his brother or any body ask him to stay ? We all asked him to stay and take some dinner, and either go to Edinburgh, or return to Gilmerton. What did he say ? He tried to eat and could not, and he sometimes sat on the fore-side of a bed, which happened to be in the room, but would not lie down. Did he afterwards agree to go to Gilmerton ? Yes. I went in one chaise with him, and Mr M<sup>c</sup>Millan and Mr Alexander went in another. On our way, the pannel desired to get out of the chaise. Did he give no reason ? No. Did he return ? No. I desired one of the postilions to go after him. He said he would not return, because he was going back to Haddington. What was done then ? We went on to Gilmerton. About what time did you arrive there ? Between nine and ten. Did you stay all night ? Yes. Were Sir Francis and Miss Kinloch there ? Yes. How long did you stay at Gilmerton ? I staid all night, and returned next morning.

Did you receive any message from Gilmerton the next day, being Tuesday the 14th of April ? Yes. I received a card from Mr M<sup>c</sup>Millan, informing me that the Major had arrived, and desiring me to come down, and bring what was necessary. What did you understand by this ? I understood, that it was meant to confine the Major, and that I should bring a strait waist-coat. I accordingly set out, and carried with me a strait waist-coat, and sent for a nurse, who sometimes attends deranged people. And you went to Gilmerton with the nurse ? Yes, and I arrived there about 10 o'clock at night. After your arrival, did you take any measures ? I went to the Major, and found him pretty quiet in his bed room, but still with the same wild look as the day before. Had you any conversation with Sir Francis, or any of the family, after you came ? Yes. Did you tell them, that you had brought the waist-coat. I certainly would. They agreed in the propriety of securing him. What was your reason for not securing him ? I spoke to the servants frequently,  
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the butler, Miss Kinloch's servant, &c. but the most of them were either averse, or afraid to do it. Do you know what made them afraid to do it? No. Had you observed arms about the Major? No, not then.

You supped at Gilmerton. Did you see the Major? He came down to the parlour about three in the morning. He came down twice. When he came in for the first time, he walked about distractedly, and complained of a violent pain in his bowels. Had you any more conversation about the pain in his bowels? He blamed, as the cause, a dose of pills which Sir Francis had given him, and which, as the witness understood from Sir Francis, were analeptic pills. This was the first time, he spoke of them? Yes. He said these pills had done him a great deal of ill, and he believed he was poisoned by them. I advised him to go to bed; upon which he left the room. Did you go up to his bed-room? No. Did he come down again? Yes. When? Soon after; within a very few minutes. Had you any conversation on that occasion? No.

*Lord Advocate.* After you came with the strait waistcoat, did you see the Major at any time out of his own room, before he came down to the parlour? I saw him once, and spoke to him. I said he had much better not go down in the situation he then was in, for that Miss Kinloch was not gone to bed. This was between one and two o'clock of Wednesday morning; and the Major had no cloaths on, excepting his breeches and shirt.

*Solicitor General.* Tell us all that passed — *Witness.* I said to him, do not go down in that situation. He said he would go down, for he wanted to see Frank. I took hold of him by the arm, and said softly, "Dear Sir, do not go down in that situation." When I took hold of him by the arm, he drew a pistol. I let go his arm. He said, take care of yourself. At that very time, Sir Francis was coming up stairs. Sir Francis said, "Gordon, what is the matter?" He replied, "I do not know what to do. Oh! I am ill, I cannot sleep." Did you or Sir Francis say

say any thing to this? The Major went into his room; I believe Sir Francis went into him. I went down stairs soon after.

*Solicitor General.* You have told us that he came down twice?—*Witness.* Yes. This was before the first time. Tell us what happened the second time? He came down in the very same distracted manner: He walked up and down: nobody spoke to him. Sir Francis went out after him, then Alexander, and then I followed. Had he all his clothes on when he came into the parlour? I do not remember. He generally had one or both his hands in his breeches pockets. The pistol that I had seen, made me suspect, that he had his hands in his breeches pockets holding pistols. From what part of his clothes did he produce the pistol when you saw it first? From his breeches pocket. When I followed them as mentioned before, and had come without the parlour door, I saw the flash of a pistol. I was then between the parlour door and the trance. The flash was in the stair. Where was the pannel, and where was Sir Francis at this time? After seeing the flash, I was so confused, that I cannot recollect; but I heard Sir Francis cry he was done for. I ran up to them. They were standing in the stair. Whether I assisted in securing the pannel, I do not remember; but I assisted Sir Francis in going up stairs. After Sir Francis was carried up stairs, what did you see? I saw a wound about three or four inches below the breast-bone. When he was laid in bed, I dressed the wound. Did you apprehend it to be mortal? Yes. Did you or Sir Francis say any thing during the time you were with him? He said it was madness in him to attempt securing his brother. I said, certainly it was. Was there any other assistance sent for? Yes, Dr. Monro, Mr Bell, and my brother. When did Sir Francis die? He died on the Thursday evening, about 11 o'clock. Are you satisfied that the wound was the cause of his death; I am satisfied it was. Did you examine the body along with the other gentlemen? Yes. Did you find the bullet? I was present when it was extracted. Mr Bell extracted it, while Sir Francis was alive. The  
witness

witness was shewn a certificate of what had been observed in opening the body of Sir Francis after his death, and was asked if he had signed this certificate? to which question he answered in the affirmative.

Did you see the pannel again, or had you any conversation with him, after you went up with Sir Francis? I do not remember of seeing him till he was in Haddington Jail. After the pistol was fired, I remember nothing about him. When did you see him? I saw him in Haddington Jail, on Friday the 16th of April. What conversation passed there? I had no particular conversation. I went up with Dr. Home, and Mr Goldie the minister of the parish. Mr Goldie said, that as his brother was now dead, it fell to him to give directions as to what was to be done at Gilmerton; for, though he was accused of a most horrid crime, yet he was not yet indicted, nor tried by the laws of his country. He replied, that he was in such a state of mind, that he could give no directions or advice about any thing. The next thing that Mr Goldie said was, that it was the opinion of lawyers, that he might, in the presence of witnesses, appoint Mr Fraser and him to act for him. What answer did the Major make? I do not remember the answer; but he agreed to it. You said the Major appeared in great horror: What did he say? He said, it was a fatal day. Afterwards, Dr. Home asked him, If he would wish to see Major Mackay and Dr. Farquharson. He said, he would be very glad to see them.

*Lord Advocate.* When Sir Francis left the parlour, immediately before the accident, did you know for what purpose he went? No. What was your purpose? Sir Francis and I agreed as to the propriety of securing the Major, if he came in a second time; but I did not leave the room with the intention of securing him. Did you send for any of the out servants to assist in seizing him? I know they were sent for. Did you know that they were dismissed? No. I did not see any of them at the time the accident happened. When did you see any of them?



them? I saw them between twelve and two o'clock. I do not know that they were sent home.

*Lord Justice Clerk.* The last time you saw the pannel, previous to the event that took place, Is it your opinion, that he was then in such a situation, as not to distinguish moral good from evil, and not to know that murder was a crime? I cannot say. I do not know what he could distinguish. Is it your opinion? When I saw him on the Monday, and on the Tuesday, I considered him mad.

*Solicitor General.* Was he mad to such a degree, as not to be able to distinguish good from evil? I cannot answer the question in any other way than that I thought him perfectly mad.

*The witness was ordered to withdraw.*

*Mr Hope.* I could have wished, that a question of this nature had been allowed to come from the prosecutor, because then I might have commented upon it with greater freedom than I can do, since it has been suggested by the Court. The question, however, I think, was a proper one; and it was properly answered. The witness, after repeated interrogations, said, That he could not take upon him to tell what the pannel could distinguish; but that when he (the witness) saw him on the Monday, and on the Tuesday, he considered him mad. He says again, "I cannot answer the question otherwise, than that I thought him *perfectly mad*." And I must say, that, as a professional man, he could not answer it otherwise than he has done. My Lords, I am not of the witness's profession; but, as a man who has paid some attention to the human mind, and to human nature, I must repeat, that the question was answered as it ought to have been.

My Lords, I have made some observations on madmen myself. Persons in that unhappy situation are too often exposed to the impertinent visits of strangers; at least, it used to be so in London: and well I remember, when at an early period of life, led by the idle curiosity of a boy, I have gone to view the places of their confinement. But,

my Lords, I hardly ever saw a man so mad, (though lying naked, and chained, on straw,) who, if the abstract question were put,—Do you think murder a crime?—would not answer in the affirmative. Madmen, my Lords, will often talk rationally on any subject, until you come across that particular topic, which has deranged their understanding. I therefore submit, that it is not proper to press the witness for a more particular answer. Has he not said, that the pannel was *perfectly* mad? The prosecutor talks of *degrees* of madness, but there is no degree in *perfect* madness? this is already the superlative degree. And when the witness, a professional man, has declared, that he cannot answer the question otherwise, I say, that any other answer which he may give, cannot be an answer according to his conscience.

My Lords, had not the witness been a professional man, I should not have insisted so much upon the point; but as a man who, from his profession, must know something of the nature of this disease, I do repeat, he could not have answered the question in any other manner; and I do submit, that he cannot be forced to give any other answer than that which he has already given.

*Lord Advocate.* My Lords, I do not intend to press the witness any farther on that point. If my brother supposes that I meant to press him to make an answer contrary to his conscience,—that I meant to push him to give me a different answer from that which he has chosen to give,—he has much mistaken my meaning. When I proceeded to press him a little farther, it was only to discover what was meant under the words “perfectly mad.” What I mean to press from him goes thus far, to see whether the same general question, at any particular period of time, will receive the same answer. This I contend, I am entitled to do; and I shall judge from the answers that may be given, what inference I shall draw to the jury.

*The witness was recalled.*

*Lord Advocate.* When you saw the pannel at Mrs Fair.

Fairbairn's on the Monday, was he in such a situation as to discern good from evil, or to know that murder was a crime? I cannot say that he could not.

When you saw him next night in his own room at Gilmerton, down to the time of his appearance in the parlour, can you say, during that period, from ten at night to three in the morning, that the pannel was in a condition to discern good from evil, or to know that murder was a crime? I have not had much practice in cases of insanity; and what such persons may think, I am at a loss to say.

You have told us, that you cannot say, that, when at Fairbairn's, the pannel could not discern good from evil; and that, with regard to the second period, you have not had much practice in cases of lunacy,—very proper answers. Now, did you observe any difference in that time, and on what side lay the difference? I did not observe any difference until he came into the parlour, when he appeared worse.

Mr GEORGE SOMNER *cross examined by* Mr HUME.—Deponed, That when at Haddington, the pannel was restless, agitated, and unhappy,—could not eat,—trembled so as to need assistance in carrying a tumbler of wine and water to his head;—did not seem disposed to drink, and got no spirits there that he knows of: That the motion of returning to Gilmerton, was not the pannel's own thought, but the witness's motion.

Mr Hume. If you were carried from this room to bedlam, and there shown a lunatic in his cell; if this lunatic, on being asked, *If murder is a crime?* should answer, *Yes*, would you, on the faith of that answer, think it safe to put yourself in his power, or to venture within his reach?

Mr Somner.—I would not.

Mr Hume. May not a person be mad, and yet know his keeper or others who are much about him, and be liable to be intimidated and controuled by them.

Mr Somner. I think he may.

Mr

*Mr Hume.* Do you think that the pannel, on the Tuesday evening, when he came to the parlour, was in such a situation of mind as to be capable of distinguishing the good or evil intentions of those who came near him, or interfered with him? or, to be more particular, Do you think he was able to distinguish, and be thankful for the good intention of a medical person like yourself, who attended to serve and assist him, from the intention of an enemy, who should come to harm him.

*Mr Somner.* I do not think he could.

*Mr Hume.* If you had attempted to wrest the pistol from him at the top of the stair, would you have run a risk of your life?

*Mr Somner.* I think I would.

*Mr Hume.* If you had tried to seize him when Sir Francis did, or if you had been in the same position as Sir Francis was with respect to him, at the time when the pistol was fired, do you believe that you would have met with the same fate?

*Mr Somner.* I believe I would.

*Mr Hume.* Did it appear to you, that the pannel, when Sir Francis was with him, was soothed and pleased with his kindness.

*Mr Somner.* It did rather appear to me; that he was more quiet when Sir Francis was with him than at other times.

*Mr Hume.* Was he ever alone with Sir Francis in the course of the Tuesday evening.

*Mr Somner.* I did understand that the pannel and Sir Francis were at times in the pannel's bed-room by themselves, but I cannot positively say so from my own knowledge?

*Mr Hume.* In the course of the Tuesday evening, were the pannel's conduct and appearance such as to persuade you, that the advice which you had given, to have him secured and confined, was a wrong, or groundless, or unnecessary advice?

*Mr Somner.* No, I still thought it right.

*Mr*



*Mr Hume.* At the time when the pannel fired the pistol, was he fully dressed, so as to be in a condition to make his escape if he had been so disposed?

*Mr Semner.* He was not.

*Lord Swinton.* You say you brought a woman and a strait waist-coat? Does it consist with your knowledge, that the pannel was informed of this? I do not think he was informed of the waist-coat, but he knew of the nurse.

*Lord Advocate.* I have asked you already your opinion of his sanity on the Monday and Tuesday. I put the same question again. When you saw him in jail, did you then think him capable of discerning good from evil, and of knowing that murder was a crime? I thought him then sensible.

*Mr Moncrieff,* (one of the Jury.) How long have you been surgeon to the family of Gilmerton? Twelve years. Do you know of any hereditary diseases in the family? No. Can you assign any cause for the pannel's derangement? No. Do you know whether the pannel, at any time previous to the accident, endured a remarkable degree of cold? I do not know. Do you know whether he resisted the taking of food? I mentioned that he would eat nothing on the Monday. Do you know whether he used to sleep well? I have observed that he was very restless.

Do you think that the resistance of cold, hunger and sleep, affords the best marks of distinguishing insanity, from cases where it is only feigned to serve a particular purpose? I think it does.

*Mr M'Aulay,* (another of the Jury.) When you saw the pannel in the chaise, did he do any thing, or say any thing outrageous? No. Did you think him drunk? No. Do you think that drink might have produced the same behaviour? I never saw him in the same situation before. Do not you think that the passions of the mind, such as fear, anger, revenge, jealousy, &c. may produce temporary fits of insanity? I think they might have put a person much in the same situation.

GEORGE

GEORGE DOUGLAS, *examined by Mr BURNET.*—

Were you a servant to Miss Kinloch in April last? Yes. Do you remember any accident that happened about the 15th of that month? Yes. It happened between three and four in the morning. What accident do you allude to? I was in the butler's parlour.—I heard the report of a pistol. Where did you go when you heard the report? I ran into the dining room, and laid hands upon Major Gordon. Did you not see Sir Francis before you went into the dining room? I just got a glance of him in passing. Did you see any pistols? I lifted a pistol within the dining room door. Was it loaded? No. It was empty, but appeared to have been newly discharged. Did you not see another pistol? I received another from the postilion, which he said he had found on Major Gordon. Was it loaded? Yes. I afterwards saw it drawn. (Here the witness was shewn a pair of pistols.) Are these the pistols you saw? Yes they are.

What did you do with Major Gordon? We laid him on the carpet, and held him down, until a woman came and put a handkerchief on his face. He then had a strait waist-coat put upon him, and was taken up to his own room. What did he say to you? He cried to let him live for one hour, and he would give us L.100 a piece. Did he speak of what he had done? He asked if his brother was dead. Do you remember any thing more? After he was bound, he asked what we were going to do with him, if we were going to cut his throat, or stab him. Was he carried up to his room? He walked up. What passed then? He said, "I have done an awful thing?" Any more? I went away. When did you see him again? Sometime through the day. What situation was he in? Did you hear him say any thing? He lay very quiet in his bed.

Did the pannel desire to see any person in particular? He asked how his sister was, and wanted to see Mr Fraser, but Mr Fraser would not go near him. He asked also how his brother Sir Francis was. Did you, or any  
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body, mention in what situation he was? When he asked, I said he was very poorly. Did he understand the answer that was made? He seemed to be sorry. How long was he in that situation? Till Wednesday night.

When he was conveyed to Haddington Jail, who went with him? Mr Hay Smith, writer, from Haddington, accompanied him in the carriage.

Did he say he was sorry for what he had done? No; but he seemed to be sorry, and sometimes appeared not to understand what was said.

GEORGE DOUGLAS, *cross examined by Mr HUME.*—Deposed, That the pannel, after being seized, said to Sir Francis's servant, *that his master had poisoned him, and that otherwise he would not have done to him what he did:* That the pannel, at the time of doing the deed, was in no condition to make his escape, having nothing on but his breeches and a great coat.

ALEXANDER CAMPBELL, *examined by Mr BURNET.*—Were you a servant at Gilmerton last April? Yes, I was postilion. Do you remember Sir Francis being wounded? Yes. At what period of the month did it happen? I do not remember the day: it was about the middle of the month. Tell us what passed? I was in the Butler's parlour, and heard the report of a pistol between three and four in the morning, and went into the dining-room, where I saw Major Gordon, and two or three servants. Did you see Sir Francis after you heard the report of the pistol? No. Did you see any pistols? Yes, I saw one in the hands of one of the lads. Did you take any pistols from the prisoner? Yes, I took one from his pocket. What pocket? He had on a great coat and breeches.—The pistol was taken out of his breeches pocket. Was it loaded? I believe it was, but cannot say for certain, as I gave it to one of the servants. (Here the witness was shewn a pistol.) Do you know that pistol? Yes. It is one of them I saw.

What

What was done with the Major after the pistols were taken from him? There was a jacket put on him. Was he taken to his room? Yes. What did he say? He said that he had been poisoned by his elder brother; and that he knew he would have been seized, whether he had shot Sir Francis or not. What more? He said that he would give them L.100 a-piece to let him live one hour. What farther conversation passed in the bed-room? Nothing more. Did you see him carried away? Yes, the same night. Who went with him? Mr Smith from Haddington.

*Juryman.* Did the Major offer to strike you, when you seized him? No; he suffered us quietly to put on the jacket.

ALEXANDER CAMPBELL, *cross interrogated by Mr HUME.*—Deponed, that, when the pistol was fired, the pannel had on a great coat, breeches, shirt, and stockings, but was without his waistcoat, and he thinks had nothing on his feet: That he certainly had not shoes on; and, if he had any thing on, it was only slippers.

WALTER GIBSON, *examined by Mr BURNET.*—Were you servant to Sir Francis Kinloch? Yes. Do you remember of Sir Francis being wounded in April last? Yes. Do you remember at what time it happened? It was about three of a Wednesday morning. I was in the butler's parlour, and heard the pistol discharged. Did you assist in seizing the Major? Yes. I took a pistol from his pocket. Was it loaded? I believe so. What passed when you bound the Major? He spoke a good deal while we were binding him. He called out, that he had been poisoned by his brother. Did he say any thing besides? He cried to let him alone, as he would live but one hour. Any thing more? I do not recollect. What did you do with him after he was bound? He was carried to bed.

WALTER GIBSON, *cross examined by Mr HUME.*—Deponed, That the pannel, when he fired the pistol, was  
not.



not in condition to escape or leave the house, being without his shoes, and as he thinks without some of his clothes: That Sir Francis, on being told that the pannel was secured said, *Poor unhappy man.* And that Sir Francis, on the Wednesday evening, on being told that the Major was carried to Haddington, said, "*What are they going to do with him there, Why dont they carry him to Edinburgh?*" but whether he meant to a goal or a madhouse he did not explain.

ALEXANDER MENIE, *examined by Mr BURNET.*—  
You were butler to the late Sir Francis Kinloch? Yes.  
You know that he was wounded in April last? Yes.  
Were you in his bed-room after he received the wound? Yes. When there, Did Sir Francis say any thing about the wound, or the person that had given it him? No.  
How long did you remain in the room? About three quarters of an hour. Were you frequently with him before he died? Yes. On these occasions, did you hear him say any thing about the pannel? No. Did you see the pannel during this time? No. I did not see him till a fortnight after.

*Lord Advocate.* How long have you been in this family? Nine years. Did you ever, during these nine years, hear any of the family say, that the pannel was insane? I overheard old Sir David say to a gentleman, that Gordon was just going mad again. Was the pannel in the house at the time? He was staying at Gilmerton, but was from home on a visit. Did you observe any appearances of madness about him yourself? I observed him unfetted. Were any steps, or any advice taken in the family about him? Not so far as I know. Did he continue to come about the house, and to be in the same way as formerly? Yes.

HAY SMITH, *writer in Haddington, examined by Mr BURNET.*—

Do you remember being in the house of Gilmerton on the Wednesday night after Sir Francis was wounded? Yes.

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Had you occasion to see the Major? Yes. What was the occasion of your going there? I went as a messenger to take him to Haddington Jail. Who accompanied the Major and you to Haddington? A servant.

*Lord Advocate.* Do you remember any thing that passed while on the road? The Major was in great distress, but said nothing. Did any thing pass when you got to Haddington Jail? I put him into a small apartment, and went to inform the Provost, who ordered a better apartment. When you first saw him, Who was with him? I went up with Mr Goldie the minister. Did the pannel hold any conversation with you? He conversed with the minister. Did the answers, which he made to Mr Goldie, appear to you collected and rational? Yes. Do you recollect any particular topic? Not, when I was first in his room. At the time I went up to take him away, which was about eight in the evening, he asked me as a lawyer, to take a protest against these proceedings, and then appeared very confused. Did you see him again? Yes, in Haddington Jail. How long did he remain there? Three or four days. Did he upon those occasions, when you saw him there, return rational answers? He did. Did you accompany him to Edinburgh? Yes. What conversation passed? About the weather. Was he rational? Yes.

BENJAMIN BELL, *Surgeon in Edinburgh, examined by Mr BURNET.*

Were you sent for to Gilmerton on the 15th of April last? I was. Were you informed of the purpose for which you were called? I was informed at Gilmerton of the business. I was told that Sir Francis was shot that morning.

*Lord Advocate.* What passed when you saw Sir Francis? I found him lying in his bed in great distress. He had been shot under the breast-bone. Did you believe the wound to be mortal? From all the symptoms, I judged him to be a dying man. Did you remain in the house till Sir Francis died? No. I waited till six o'clock next morning.

morning, not thinking it necessary to remain longer. Are you of opinion, that the wound was the cause of his death? Yes.

Did Sir Francis hold any conversation with you concerning the person who wounded him? He never did; except asking what was become of that *unhappy man*.— Did he not name the person? No. Did Dr Monro attend? Dr Monro was sent for along with me, but did not go. When you first of all examined the wound, on Wednesday morning, did Sir Francis tell you how he had got it? I had been told, that the person who fired the pistol was uppermost in the stair, and therefore, I imagined the ball might have taken an oblique direction; but Sir Francis gave me a distinct account of the accident, by which I understood, that the ball had gone right across his body; and I felt it with my hand near the back bone, from whence it was extracted. Did you open the body after death? Yes, in company with Mess. Sommers. There was a report drawn up. Would you know the report again? Yes. (Here the report of what had been remarked on opening the body of Sir Francis, was shewn to, and recognised by Mr Bell.)

How did Sir Francis describe the situation of the person who shot him? He said, he was standing on the same step of the stair with himself, and that the pistol almost touched his body; and this account tallied exactly with the situation in which I found the ball.

*Lord Justice Clerk.* Did he name the person? No, he never named him.

(Here the witness was shewn the ball which he had extracted from the body of Sir Francis Kinloch. It was wrapped in a piece of paper, upon which Mr Bell had marked the initial letters of his name.)

*Lord Advocate.* Did ~~you~~ you know the family of Gilmerton before this accident? Yes. I sometimes attended the late Sir David. When you went to Gilmerton on these occasions,

occasions, did you see the pannel? Yes. Did you ever know, or understand that the prisoner was insane? I never did.

Had you occasion to attend the pannel since the 24th of May? Yes. At Mr Warrender's desire, I have attended him in Edinburgh Jail since that time, twice a-week. Now, I ask you this as a professional man, Did you ever see, believe, or judge him to be under any degree of insanity? I never did. He always behaved with propriety; but he appeared under great anxiety of mind, and depression of spirits. Did he seem to know his situation? Yes.

Mr BENJAMIN BELL, *cross examined* by Mr HUME.—Deposed, That he visited the pannel twice a-week, from the 24th May,—and sometimes remained with him from 15 to 20 minutes: That he generally sent up previous notice of his being there: That he cannot give an opinion upon these his visits, that the pannel might not be furious on the 15th of April,—nor ever that he might not show symptoms of derangement in the intervals of his visits;—for that the state of insane persons is liable to sudden and unaccountable variations: That he could not pretend to know a madman by the state of his pulse, or the feeling of his skin; for that, though, in the beginning of insanity, there is often fever, yet a confirmed state of insanity is not ordinarily attended with any; and that, in this, the delirium of a fever is distinguished from that of insanity: That madmen very often can distinguish their keeper, or others who are much about them: That in many instances, they are capable of dissimulation, and show cunning and contrivance to gain their ends: That one of the most constant symptoms of madness, is a jealousy of plots and conspiracies against them; and that most frequently the objects of these suspicions are their best friends, or the persons to whom they had been most attached: That the most certain means of distinguishing a madman, are 1<sup>st</sup>, By his actions and conduct; and,

2<sup>dly</sup>,



2dly, By the appearance of his countenance, especially of his eye, which has a peculiar wildness: That restlessness,—want of sleep,—odd postures,—strange gestures,—and the like, are also among the indications of the malady: That if a person has been subject to occasional derangement, and should swallow a great quantity of laudanum, this, in his case, might be more apt to produce a furor of a few days, and the person afterwards make a quick recovery, than in the case of a person who had never been subject to such disorder: That the confinement, solitude, and quiet of a jail, would be likely means to promote and assist such recovery.

Dr. ALEXANDER MONRO, *Physician in Edinburgh, examined by Mr BURNET.*—

Have you attended the pannel in Jail? Yes. How often have you visited him? four different times since the 24th of May. What situation did you usually find him in with regard to his mind? I saw no marks of insanity. Did you converse with him? I did. Did you feel his pulse when you visited him? Always, and I found it calm and regular.

Dr. MONRO, *cross examined by Mr HUME.*—

Deponed, That he had paid the pannel four visits in Jail after the 24th May. Being asked the same questions as Mr Bell, he made the same answers in substance; and in particular, being asked, whether madmen were more apt to be jealous of their enemies or of their friends and near connections? He answered, That their friends were most commonly the objects of their suspicion, and that he thought it natural it should be so; for as madmen were not sensible of their own condition, or of the necessity of restraining them, and as friends and relations were chiefly active in controuling or imposing restraints on them, so these persons irritated them, and in consequence became the objects of resentment. He added, that in his visits to the pannel, which might be from 7 to 15 minutes,  
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he avoided any topic that could irritate him; and that if he had remained a whole, or half a day with him, he could better have judged of his condition: And, upon the whole, That he could only give an opinion as relative to the times and occasions when he saw him, and nothing more.

*Lord Advocate.* Did you ever, in the course of your practice, know a person who went mad for forty-eight hours, and then recovered and continued well? Never, except when the person had swallowed a great quantity of liquor, or owing to some adventitious cause.

*Mr Hope.* May not a person, who has been subject to fits of madness, become suddenly insane, and recover again? He is more apt to do so, than a person who never was insane. May not the taking of laudanum, by a person who has been occasionally insane, produce a fit of insanity? Yes.

CHARLES HAY, *Esq.* *Advocate, examined by the Solicitor-General.*—

Were you well acquainted with the late Sir Francis Kinloch? I certainly was

Did he consult you upon any points after his father's death? He did ask my opinion respecting his father's settlements sometimes after his death.

Will you be so good as mention every thing which you remember that passed between Sir Francis and you upon that occasion; and, in particular, any thing respecting differences which had occurred between him and the panel.

*Mr Hay,* (addressing the Court.) My Lord, it is a delicate situation in which I stand, I am called upon to give evidence, not to facts consistent with my personal knowledge, but to disclose conversations of a confidential and private nature, that passed between Sir Francis Kinloch and me, not only as a friend, but in my professional character of a lawyer. I should therefore be glad to know from the Court,

Court, whether it is their opinion, that I am bound to give an account of these confidential conversations.

*Lord Justice Clerk.* Your delicacy, Mr Hay, is proper; but it is the opinion of the Court, you ought to answer the question. When called upon in such circumstances, and in a case of this importance, it is your duty to give the Court and jury all the information in your power.

*Mr Hay.* From the regard I bore to Sir Francis Kinloch, I intended to go out to Gilmerton the very day after the last Winter Session rose, in order to pay my respects to him on occasion of his father Sir David Kinloch's death; but, being unwilling to put him under any restraint, I wrote to Mr Duncan M'Millan, who, I knew, was then at Gilmerton, rather than to Sir Francis himself, and desired him to let me know, whether it would be perfectly convenient for Sir Francis to receive my visit at that time. Mr M'Millan returned me an answer, that Sir Francis would be in Edinburgh before the time I proposed to be at Gilmerton, and that I would see him. Sir Francis arrived in town upon the 10th or 11th of March, and dined with me on the 12th or 13th, when he took occasion to mention, that his reason for coming to town, was to advise with his friends concerning differences which had arisen betwixt him and some of the other branches of the family, concerning his father's settlements, or rather after incidents.

*Mr Burnet.* Explain what were these after incidents, and with what branches of the family these differences had happened.

*Mr Hay.* Sir Francis told me, that after Sir David's settlements were opened, appointing him his father's general disponee, he, having got the key of the repository in which Sir David lodged his papers, observed, that Sir David had been accustomed to preserve almost every letter that he received, on matters of trivial importance, and other papers of no consequence, for which reason,  
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he desired Mr M'Millan, and Mr Frazer, sheriff-clerk of Haddington, to separate the rubbish from the material papers, and to destroy the former, which he understood that they accordingly burned, or at least great part of it. This inspired a jealousy into the mind of his brother the Major, that papers were destroyed to the prejudice of the younger branches of the family, which he communicated to his younger brother Mr Alexander; and it was on account of this misunderstanding, that Sir Francis told me, he had come to town to take my opinion and that of Mr Solicitor-General on the subject.—Sir Francis then shewed me the general disposition by his father in his favour; and, on reading it, I told him I was clearly of opinion, it was properly conceived, so that it was impossible there could be room for any dispute between him and his brothers, unless it should so happen, that the claim of legitim to the younger children was not discharged in their father's and mother's contract of marriage, in consideration of special provisions being settled on them, which I mentioned to him would probably be the case, as few contracts of marriage were entered into, at the sight of regular men of business, without a clause to that purpose. I having then explained to Sir Francis the nature and extent of the claim of legitim which would ly in this particular case, he immediately said, that the provisions settled by Sir David on the younger children, were superior to what they could claim in virtue of the legitim, even if it were not discharged; whereupon I expressed my satisfaction, that there could be no ground for any legal dispute, and it was suggested that there would be no necessity to trouble the Solicitor-General for any opinion on the case, at least till Sir Francis should have an opportunity of looking into his father's marriage-contract, which he was not then possessed of. A great deal of conversation passed upon the subject, with the exact particulars of which I cannot now charge my memory, but I am certain I have told the import of it.

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Had you any subsequent conversation with Sir Francis on this subject?

I called upon Sir Francis a few days thereafter at Dumbreck's hotel, where he was confined with a heavy cold. He then desired that I would give him a written opinion upon the subject of which we had formerly conversed, to be communicated to his brothers. I declined giving him a formal opinion, mentioning, that it occurred to me, that a letter written, as from one friend to another, might have a better effect. Sir Francis agreed with me, and I accordingly wrote, and delivered to him out of my own hand, a letter containing my sentiments.

Mr HAY, *cross interrogated by Mr HUME.*—

Did Sir Francis afterwards mention to you, that he had communicated your letter to his brothers?

In eight or ten days thereafter, I was with Sir Francis in a mixed company, and in a whisper asked him, Whether he had shewn my letter to his brothers? To which he answered in general terms, that he had; but no farther conversation passed, and I never saw him afterwards so far as I recollect, as this was either the Saturday se'ennight, or Saturday fortnight preceding his decease.

Did Sir Francis write to you, complaining that your letter had not had the desired effect?

No, he never did.

*Lord Justice Clerk.* Did you understand that the difference between Sir Francis and the pannel had risen to a great height.

To a very great height indeed.

*The Reverend Mr GEORGE GOLDIE, Minister of the Gospel at Athelstoneford, examined by Mr BURNET.*—

Had you occasion to go to the house of Gilmerton soon after Sir Francis was wounded? Yes, I went there on the morning after the accident happened; I heard of it between eight and nine, and immediately went down. Did you see the Major? Yes. What passed? After I had been  
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some time in the house, I was made to understand, that Major Gordon wanted to see me. I accordingly went up, and found him lying bound in bed with a strait waist-coat on, and in a very distracted state. I asked him how he was; he answered "very ill." He then asked me to sit down by his bed-side. I did so, and asked him if he recollected what had passed? he said he did. I asked him, if he was not filled with horror at what he had done? He answered with a furious air, and in a low tone of voice uncommonly stern, "No." my own feelings were much distressed, and I exclaimed "Are you not filled with horror at the recollection of a deed that has destroyed one of the worthiest of men, and best of brothers,—a deed, that has thrown a family into a state of distraction, and a whole country into the most extreme misery?" He again answered in the same tone, that what he had done was in self defence. "There was," (said he) "a deliberate plan to form—ed to destroy me." "Who told you of that plan?" He replied, "that he knew it well." "You could know it only (said I.) "from the jealousy, or suspicion of your own mind, for the worthy man, whom you have destroyed, was incapable of forming a plan against any human being." "I shall die, (said he) this evening; my brother has poisoned me. He has given me pills, which have already deprived me of the use of all the lower parts of my body." I replied, I knew nothing about pills; but, if he had got pills, they had been given him with a view to do him good, not to hurt him. Had you any further conversation? He cried, to take away the people that were about him. I believe, he meant the woman, and the man servant who attended him, who, he thought had a design to murder him; and he insisted upon me staying with him upon that account. He said, he understood there was no danger of Sir Francis. I answered, that whoever had told him so, had been deceiving him; for I had the best authority, the authority of the medical gentlemen, for saying, that the danger was most eminent, and that, in all probability his brother would be a corpse before even-

ing.—

ing.—Did you see him upon any occasion in the afternoon? Yes. Towards the evening he became very outrageous, and attempted to burst asunder his bonds. He cried, that he wanted to see me; and, when I went to him, he insisted that I should use every endeavour to set him at liberty. He ordered the servants to go out of the room; for, he had something particular to say to me. I desired the servants to walk out. He then told me, that he must be put in a chair before he could communicate what he had to say to me. I told him, he could inform me of any thing very well where he was. He then told me, it was about money matters: he said, he had several hundred pounds which no body knew of, and he wanted to settle it. I told him there were men of business in the house, who might be consulted about that, and then sent to Mr Fraser and Mr Smith. When Mr Smith came into the room, he said to him, “who has a right to use me in this “tyrannical manner; is it not competent to take a protest against them?” Mr Smith said, it could not be done. The Major then spoke of settling some money matters; and Mr Smith having said, it would be better to delay that business till afterwards, the Major replied, “why not now,”

“Procrastination is the thief of time.”

Had you occasion to see him afterwards in Haddington Jail? Yes. What conversation passed there? I told him, that I had come at the particular desire of the friends of the family, to receive directions about the management of affairs at Gilmerton. He declined giving any directions, but left the whole to his brother Sandie. I informed him, that his brother was from home, and that the friends of the family were of opinion, that some directions were absolutely necessary in the meantime. He said, that the friends ought to do what they thought most proper. I then told him, that the friends of the family had suggested, that Mr Fraser and I should be appointed to take the management, and that they wished to have his consent; and that, if this proposal met with his approbation,

probation, I would write out, in his name, and in presence of two respectable witnesses, a power to this effect; to all which he agreed, adding, that he was in such a state, that he could not attend to any business. A power was accordingly written in presence of Dr James Home and Mr George Somner, and a clause subjoined, that, if Mr Frazer and I should meet with any difficulties, we should take the advice of gentlemen of the law.

*The Reverend Mr GEORGE GOLDIE, cross examined by*  
Mr HUME.—

Do you recollect what conversations you have had with the pannel since he came to Edinburgh? I have seen him frequently in Edinburgh, and occasionally mentioned to him how he had acted, and the fatal event that had taken place. His answers were various. At the times when he was correct, he expressed great regret that he had not been seized and disarmed before he committed the unlucky deed. It was not merely regret, he expressed horror at the deed, and astonishment, from what he had afterwards learned as to his situation at the time, that it had not been put out of his power to do any thing of the kind. He blamed his friends in very strong terms, for having treated him with so much lenity. Had you any conversation on the day of the accident, about an English bank bill? Yes. In the course of that day, at Gilmerton, when Mr Hay Smith was present, and it was proposed to make an inventory of the pannel's money and papers. He was asked, If he had any money in his pockets? To which he answered, he had a bill for L.30 in them. Upon searching, I told him, I could not find it. He said, he was perfectly certain of having brought it to Gilmerton the day before. I then went down stairs, and informed Mr Frazer of this circumstance. Mr Frazer said, "we know about the bill; he gave it to William Reid the gardener last night at Beaufort, who gave it to Sir Francis." I returned, and told we had found it, and in what manner. He



He had no recollection of having done so; and just said, "Honest William."

*Lord Advocate.* How long have you been settled at Athelstoneford? Since April 1778. Is Gilmerton in the parish of Athelstoneford? Yes. You would be sometimes at Gilmerton? I had the honour to be frequently there. Of course, you would be acquainted with the family? I was well acquainted with all the family. Was the pannel at the bar frequently there during your visits? He was. Did you ever, previous to his father's death, know that the pannel was insane? Never, from my own personal knowledge or observation. Did you ever, previous to Sir David's death, hear that the family had taken any steps to confine him? I never heard of their taking any, previous to Sir David's death. Did you ever hear of the pannel being insane? Yes. I remember in June 1790, I went to Dunbar, to assist a brother minister in dispensing the Sacrament. I lodged at Mr Lorimer's, who informed me, that he had seen my friend, Major Gordon, who had behaved in a very strange manner: That he was very glad I had come, for, if he had not had the prospect of seeing me, he would certainly have written to desire me to inform the family; and he told me, that the behaviour of the Major was such, that he considered him as deranged. Did he give you any reason for that opinion? He said, that he put himself into strange attitudes, and went about the room beating his breast and head: That he ordered a chaise for Gilmerton, but in place of going to Gilmerton, he drove through Dunbar, and, as Mr Lorimer was informed, had gone to Dunse. Did you hear of any other instances? No. Did you inform any of the family of what Mr Lorimer had told you? I mentioned it to Sir Francis, who was then Mr Francis Kinloch. Since Sir David's death, did you make any observations on the pannel's behaviour? I have seen him in great depression of spirits. Did you form an opinion, that he was insane? The last time that I had the pleasure of seeing him at Gilmerton, previous to the late melancholy

eholy event, was on the 28th of March. An old coachman of the family, (Peter Dickson,) seeing the Major in a very distressed situation, had considered it his duty to call at the Manse the day before, when I was from home, and said, that he thought the Major should not be left by himself. On the morning after this information, I went to Gilmerton, and found the Major walking in the avenue. He told me, that he did not know what was the matter with him; he could not settle in any one place, nor fix his mind on any one subject. I thought he was not fit to be left by himself; and though I had occasion to leave him at this time, and though he did not as usual invite me back to dinner, yet I returned, and found him walking about. Fearing he might think I intruded, I felt myself obliged to apologize. I said, "You well think, Sir, your evil genius haunts you to day; but I thought you would be dull by yourself, and have therefore used the freedom to come to dine with you." He thanked me, and said he was very glad of my company. Did you observe any thing uncommon in his behaviour on any other occasion? Yes. On the 12th of April, the Sunday immediately before Sir Francis's death, I saw a carriage stop opposite to the manse. I immediately went out, and saw the Major; and, upon my asking him, he came out of the carriage. When we came in, (we had just done dinner,) I asked him if he had dined? and he said he had; I said that it was much earlier than his usual hour of dinner. Supposing that he said he had dined, with a view not to give trouble to the family, I told he could have a dinner immediately and without any trouble. He repeated, that he had already dined. I then asked him, If he would take a glass of wine? He said, he would just take what was on the table, which was toddy: he then put a small quantity of spirits into a tumbler glass with water, but was so uncommonly agitated, that, in carrying it to his head, he spilt a great deal of it upon the table, and drank very little of it. He told me, he wanted to speak to me privately; upon which we went into another room. When there, he  
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asked me, How many children I had? This question had been asked and answered below stairs; he repeated the same question again, and walked about the room in great agitation. I reminded him, that he had something particular to say. Of this he took no notice, but again asked me, How many children I had? I reminded him a second time, that he said he had something to communicate to me. He then said, he believed he should not be long in this world, and that, when that event took place, it would not be the worse for my family. I said, that was the language of his present depressed state of mind; and added, that at his time of life, and with a constitution naturally so vigorous, he had no reason to apprehend any danger of that kind, and he might hope to live many years; and I advised him to live regularly and quietly, instead of driving about as he had lately done, which tended to agitate his mind; and said, that a few weeks spent in retirement, would restore him to the comfortable enjoyment of himself and friends. Did any thing else pass? I recommended to him, to think of some useful employment, and to take the advice of his brothers and other friends on that point. In speaking of his brother Sir Francis, I said he was a worthy man; and the Major repeated my words, saying, *he was a worthy man.*

*Lord Justice Clerk.* You have mentioned a long conversation. From what passed betwixt you, did it appear to you, That the pannel's answers were incoherent and absurd? He seldom made any answers, and his behaviour was such, as to make the impression on my mind, that he was very absent. But such answers as he did make, Were they incoherent, or foreign to the purpose? I cannot say so; but I formed the opinion, for the first time, that he was deranged, and not himself. Did you think him capable of judging between right and wrong? I cannot say but he was. Did you inform his family of what had passed? I did not make up my mind that night, as it was a very delicate point; but I went on Monday, and told Miss Kinloch what I had observed. I begged that the most prudent measures might be taken for securing  
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the Major; and said, that the honour and happiness of the family was deeply concerned in this; for I was much afraid, he might commit some desperate deed. Miss Kinloch told me what directions she had given to Mr George Somner which relieved my mind from great anxiety, which had been impressed on my mind by his behaviour the day before. Miss Kinloch had, in the meantime, sent a message, desiring to see me. Did you go of your own accord to give your opinion, or in consequence of Miss Kinloch's message? I had previously made up my mind to go, and would have gone, although the message had not been brought; but I was obliged to be from home on the Monday forenoon, and on my return in the afternoon, with the view of going to Gilmerton, I found the message had been left during my absence.

*Mr Hume.* When you mentioned to Sir Francis, in 1790, what you had learned from Mr Lorimer, What did he say? He was in great distress; and said, that he had got similar accounts from different people, and that he did not know how to act, or what to do. Was the pannel much affected with his father's death? Very much. He had paid particular attention to Sir David during his illness, and I never saw a son behave with greater propriety, or give stronger marks of filial affection. Did he remain at Gilmerton after his father's death? Yes. That event happened on the 19th of February last, and the pannel remained at Gilmerton, (at least chiefly,) till the end of March. Did you ever hear him express any dissatisfaction at his father's settlements? No. To me he expressed great satisfaction. In particular, I remember he frequently said, he should always have a grateful sense of his father's attention; by which I understood, he meant to express his gratitude for the annuity which his father had left him. On the Sunday, when he came to your house, Did he remain long? About three quarters of an hour. After you went up stairs, did you gather from him what business he had come upon? I never got him to tell his purpose, except that



that he thought he was soon to die, and not even that, until I had reminded him two or three times, that he had said, that he had something to communicate to me. Was his conversation connected? He spoke very little, but walked up and down in the room with great agitation, while I attempted to amuse him, by talking about common occurrences. Did he ever express to you any dissatisfaction on account of his father's papers being destroyed? No. From your knowledge of him, what was your opinion of his disposition? I used to be intimate with him: He honoured me with his confidence; and I always found him humane, warm-hearted, and generous; in particular, I had occasion to find out by accident, that he relieved a woman in great distress. The poor woman was very ill, and I felt it my duty to provide her with necessaries; but I found, upon enquiry, that the Major had been supplying her with money, and that he had done so upon many former occasions.

ALEXANDER FRASER, *Sheriff Clerk of the County of Haddington, examined by Mr BURNET.*—

Were you in the use of doing business for Major Gordon Kinloch? Yes, I was his factor for some years on the estate of Woodhall, prior to the sale of it near ten years ago; and after the sale of it, occasionally did money business for him down to Sir David's death. After Sir David's death, Did you do business for him? He gave me a faculty to uplift annual rents and annuities, which was dated on the 3d of April last.

Do you remember the day on which Sir Francis received the wound? Yes, it was on a Wednesday. Did you see the pannel since that time? I saw him on the Saturday before, in Haddington, but I never saw him since that business.

When you transacted business with the pannel, Did you think he understood what he was about? Certainly, otherwise I would no have done business for him.

Here the witness was shewn and identified a letter from

G

Sir

Sir Francis Kinloch to him, dated the 15th of April last, and referred to in the Indictment. It was expressed as follows: " See if you can find out the marriage contract betwixt my father and mother, as also Lady Ashe's contract, and send them *per* bearer, that they may be laid before Charles Hay, along with my father's will. If Gordon and Saunders are not pleased with his opinion, they must judge for themselves."

The witness also read a copy of his answer to this letter, bearing the same date, and of the following tenor:—" Your father and mother's contract of marriage has not been found, but the indentment upon it, which, with Lady Ashe's contract, and also an obligation by Sir Thomas Ashe, and discharge by them both, making in all four deeds, are herewith sent. I have communicated your letter to both your brothers."

*Mr Burnet.*— Do you recollect of Sir Francis going to Edinburgh, to take the advice of counsel? Yes, I think he went on Tuesday the 10th of March. Do you recollect the reason of his journey? Sir Francis told me at Haddington, that his two brothers had found fault with their father's settlement, and on account of Sir Francis having burnt some papers. I advised him to lay his father's settlement before counsel, to know upon what grounds he stood, as the sooner he cleared matters with his brothers the better.

Which of the brothers was most dissatisfied? He told me, that Major Gordon Kinloch egged on, or stirred up the other.

Whose advice did Sir Francis take on this matter? He consulted Mr Charles Hay. The advice came in a letter. Sir Francis desired me to communicate the opinion to his brothers. I accordingly gave the letter to Mr M'Millan, to be shewn to the Major and Mr Alexander Kinloch? but before I had received it, I had a conversation with both the brothers upon the subject, and particularly with this gentleman at the bar. The result of this conversation was communicated to Sir Francis by letter.

Here

Here the witness read copies of two letters from himself to Sir Francis, the one dated 16th and the other dated the 17th of March last. That of the 16th was conceived in these terms: " Being only this moment come home, I have only time to inform you that from, what, passed with both your brothers last night it is almost impossible that any dispute can arise. I shall write more fully to morrow."

The letter of the 17th of March was expressed as follows: " Having talked upon the business to the Major, the only thing he stated as a claim is L. 200, which he said he was paid short of the 1500. The particular circumstances of one of his commissions rendered it unnecessary to advance the L. 200, but he said, that though that sum of L. 200 may be some object to him, yet that he never meant to have any serious dispute with you about it; so far from that, he is quite ready to grant any discharge that shall be asked of him. He and Mr M-Millan came up this morning with Miss Alston, and the Major in the frankest manner repeated the same thing, which I told him I would immediately communicate."

" I had a conversation also with Mr Alexander on Sunday night, and I am in justice bound to report, that he declared his perfect readiness to settle the business in the most friendly manner, reprobating every idea of a contrary nature. In a conversation afterwards with Miss Kinloch, she informed me, that she clearly pointed out to Mr Alexander, that he had cost a great deal more than L. 600 to his father, so that he had no cause to complain."

The witness next identified the following letter from Sir Francis to himself, without a date, but marked 18th March 1795 on the back, and referred to in the Indictment, viz. " I never looked on Gordon and Saunders having serious intentions of going to law. Their doing so would be more pleasant than talking about burning papers, and talking nonsense, which can only originate in human infirmity."

*Mr*

*Mr Burnet.*—Do you recollect having any conversation with the pannel respecting a paper which he said he had signed? I remember, several years ago, he told me that he had signed a paper in the presence of his father, his brother Sir Francis, Mr F. Anderson, and Mr M'Millan, which he believed was to disinherit him.—I told him that it was impossible. About a week after Sir David's death, he spoke to me on the same subject; but as I found arguing the matter seriously would not do with him, I thought it the better way to turn it into ridicule, and said, "Sir, the persons that you say were present, are all alive but your father, Why do you not prosecute and expose them."

Do you commonly keep copies of the letters you write? Yes. Is that the copy of a letter which you wrote to Major Kinloch? Yes.

The witness then read a copy of a letter from himself to the pannel, dated the 21st of April last, and expressed thus: "As you was pleased lately to grant a factory to me, and to lodge papers of value in my hands, it appears to me very proper to inform you, That in consequence of the late fatal occurrence at Gilmerton, a trial must take place, and to know from you if you wish to retain counsel for your defence, which in that case shall be immediately done, and also to know who are the advocates and agent you wish to be engaged."

The witness then identified the two following letters from the pannel to him, viz.

*Haddington Jail, 22d April 1795.*

"Sir, I received your letter, last night couched in a file not like the usual, owing as I suppose, to the late most unfortunate occurrence. The reason of my not seeing you, owing to your official capacity, I by no means (if allowed to think,) a good one. I do not see any impropriety in your coming to me once to confer on business. If after reading this, your opinion should be still the same, let me know; and if my message was delivered at Gilmerton, which was given to Mr Dodds."

"Sir



" S I R,

*April 22. 1795.*

" Please send me the note of Mr Dalrymple for  
" L. 62, 2s."

The witness next read a copy of his answer, dated the 23d of April, and of the following tenor: " I received  
" both your cards late last night, and not having been  
" informed that you was to go off this morning, I put off  
" answering them till about breakfast time, when I was  
" informed you was gone. The only thing that now  
" requires an answer, is your demand to get up Mr Dal-  
" rymple's note for L. 62, 2s. The advice I got about  
" your property under my charge was, to advance the  
" ready money for necessaries to you, and consulting  
" counsel for your defence, if you chuse to retain any.—  
" I accordingly intimated to Provost Hillop, that all ne-  
" cessaries furnished to you should be paid; and I need  
" not repeat that I wrote you about retaining counsel.—  
" I was further advised, that I was not warranted to de-  
" liver up any other part of your property but by le-  
" gal authority; so that I cannot comply at present  
" with your request about Mr Dalrymple's note. At  
" same time, if the acceptor proposes to pay the con-  
" tents of it, it seems to me very proper, to take the  
" money, and lodge it in the hands of your bankers as  
" part of your property. Your message to your brother  
" was delivered, but he returned no answer. Mr Gol-  
" die said he would call."

*Lord Advocate.*.. The Gentlemen of the Jury will ob-  
serve, that this letter alludes to the pannel's being re-  
moved to Edinburgh.

The witness then identified the following letter, which  
he had received from the pannel by post, and is referred  
to in the Indictment, viz.

" S I R,

*Edinburgh Jail, 24th April 1795.*

" I wrote you from Haddington, requesting you  
" would send the promissary bill of Mr Dalrymple of  
" sixty-

“ sixty-two pounds, two shillings. I do not mean that it should appear against him.”

*Lord Advocate.* You have known this gentleman several years. Did you ever imagine he was insane? I have sometimes observed him peevish and discontentd; but I never saw any marks of insanity in his appearance, till Monday the 13th of April last, when it occurred to me, from the recollection of some circumstances in his behaviour on Saturday the 11th, (on which day I had seen him at Haddington,) that the state of mind in which he then appeared to be, had been in its progress on the Saturday.— What state of mind did you think him in on the Monday? Downright mad; that is, he appeared to be deranged, or as if the rational powers of his mind had left him; and Sir Francis thought the same. Did you, such being your opinion, Propose securing the pannel? Yes, I did. What reason had you for believing him deranged? His wild appearance and behaviour. I should have mentioned, that I was on my road to Gilmerton on the Monday, when a servant met me, and put into my hands a letter from Sir Francis, which began with these words: “ I am sorry to inform you, that Gordon is stark mad;” and Sir Francis added, that George Somner had been sent for, on account of the Major having told Miss Kinloch, that he had swallowed poison, though, whether the case was so or not, Sir Francis could not say. Have you that card? No. What became of it? It was torn in pieces, and committed to the flames. Sir Francis and a Mr Low, (who happened to be at Gilmerton at the time,) having walked out, I was left with no other company than the Major, whose behaviour, as he both spoke and acted in a most extravagant manner, rather alarmed me. At one time, he brought into the parlour a blunderbuss, with which walked he up and down the parlour, making many wild motions, and sometimes holding it in the position of presenting; and I had occasion to see him put a flint into it, prime it, and load it with powder. At length, to my great satisfaction, he carried it out, and placed it in a  
chaise

chaise which was waiting for him at the door, and in which he left Gilmerton. But while we were together by ourselves, as already mentioned, I happened inadvertently to take Sir Francis's letter out of my pocket, and observing the Major coming towards me, and being afraid he would see it, I tore it in pieces, and committed it to the flames; and indeed I thought it a lucky circumstance, that he did not see it.

Did the pannel appear much agitated upon this occasion? He loaded the blunderbuss with great difficulty. His hands shook in a most extraordinary manner.

**ALEXANDER FRASER, cross examined by Mr HUME.**—Did it appear to you, that all risk of disagreement between Sir Francis and the pannel was over, after the conversation you had with him? It appeared to me that all differences was at an end, and it gave me great satisfaction. What was Sir David's settlement? The sum he left to each of the younger brothers was L. 1500.—Mr Alexander got only L. 900; but Miss Kinloch explained to him, that he had cost his father a great deal more than the other L. 600, and he was satisfied.

Had you any conversation with the pannel about the renunciation which he supposed he had signed? I had; it appeared to me, that this opinion of his was wild and absurd.

When you were alone with the pannel on the Monday, in the parlour of Gilmerton house, Did you conceive yourself to be in danger? I felt myself in a very disagreeable and dangerous situation. Did Miss Kinloch give you any information of his behaviour on the preceding night?

Here the witness looked at some notes which he said had taken in his calmer moments, after he was informed by some of the gentlemen in Court, that he was likely to be called upon to give evidence in this trial. He then proceeded as follows, reading from the notes.

When I arrived at Gilmerton, Miss Kinloch was in the parlour, and soon called me to the lobby, and informed me, that they had been much disturbed and disconcerted

asserted, and even alarmed by the Major's conduct the preceeding night; that he had been very restless, having gone from room to room, throwing himself upon the beds. She reflected upon his drinking too much brandy and gin said preceeding night, and she also informed me, that he had told her he had swallowed poison.

*Lord Advocate.* I must object to this mode of proceeding. There can be no objection to a witness refreshing his memory from notes, before he comes into Court; but he is not to prepare a paper, then come to the foot of this table, and read his narrative from beginning to end, and then to go away. That, I say, cannot be admitted as evidence.

*Lord Esqgrove*, signified that he agreed in opinion with the Lord Advocate.

The witness was ordered to withdraw.

*Mr Hope.* My Lord, I trust I know something of law, and have some idea of common sense and reason; and I believe, I know something of the law of evidence also.

My Lord I admit, that if a witness were to take from his pocket a paper, lay it on the table, and say there is my evidence, and then walk away, such a proceeding could never be permitted by your Lordships; but the case is very different, when a witness, after an affair has happened, who because he was not present at the accident, could not know or suspect that he was to be a witness, takes down notes as soon as he is informed that he is to be called upon, and looks at them here, to assist his recollection on a specific question being put to him.

When I undertook the defence of the pannel, I felt it my duty to investigate the matter to the bottom, and to discover every thing that the witnesses could say. In the course of my enquiries at Haddington, I saw Mr Fraser, who told me several very material circumstances. I went to Gilmerton to see what could be made out from the information of the family, and there it was that I learned from the servants that Mr Fraser had been there the day before the accident happened. When I came back to him

next



next morning he had been recollecting in his bed, and now remembered a number of circumstances that had escaped his memory on the day before. Then said I, " Mr Fraser, put down in writing all that you remember, as each circumstance occurs to your recollection for as you did not recollect these things last night, it is probable that you may not recollect them when you come before the Court, concerned and agitated as you may be."

Now, my Lord, was there any thing improper in this?  
*Court.* No.

*Mr Hope.* Then is not the witness bound, by the obligation of the oath which he has taken, to look at his notes; for that oath requires him, not only to tell what he recollects, but all that he knows or shall be asked at him. If therefore, a witness is conscious that things may have escaped his memory, he is bound to resort to any means that can render him more accurate.

If a witness takes down notes at the time an affair happens, he is always allowed to resort to them to refresh his memory. The case is the same with a person who takes notes the moment he is told, that he is to be called as a witness. The notes are the best evidence he can bring, and he is equally entitled to use them.

Had it been, as the Lord Advocate said, to read a paper from beginning to end, and then go away, the matter would have been very different indeed; but, my Lords, it was but on one question that the witness had recourse to his notes, And how does the Lord Advocate know that he is to use them any more? I say, in law, in reason, and in justice, he is entitled to use them when his recollection fails. I do not desire, that he shall read his paper from beginning to end, but only that he shall be at liberty to use it occasionally to refresh his memory. And I say, with submission, but at the same time with some degree of confidence, that the judgement of the Court cannot be otherwise.

*Lord Advocate.*—For all that I have heard, I still feel it  
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my duty to state the contrary opinion. My brother misunderstood my meaning, if he thought I imputed to him any thing improper in the activity and zeal he has shewn in this cause, much less do I care whether the paper was read from beginning to end, or partially. I can have but one desire, in common with the Jury, the due administration of Justice. But, my Lord, I repeat again, that my objection is well founded.

If, in the course of examining any witness, he shall find himself at a loss, and desires to consult notes taken on the spot, and at the very time a transaction happened, I say it is competent for a witness so to refresh his memory: But it is not so with notes taken at a distance of time: they must be taken immediately, because it may be in the power of a witness, by the means of such notes, to make up so connected a story, that I defy the counsel on either side to make out the fraud.

I am far from saying, that this witness has any such design. I am far from supposing that the gentlemen, who conduct this trial, could take any unfair advantage; but, as public prosecutor, it is my duty to prevent the establishment of any bad precedent. What has been done in this case, may be done in others, by low attorneys; not by counsel,—I cannot suppose it of them.

I agree to this, that in general, if a witness does not recollect, he may look at notes taken at the time. But I demand of the Court, if notes taken at a distance of time, ought to be admitted in evidence. I ask you to judge. I am bound to obey;—and to that judgement I always submit with pleasure.

I shall only add, that it was held in the trial of Mr Horne Took, that notes taken at a distance of time could not be used by a witness. The point was long and ably contended by both sides of the bar, and at last decided against the admission.

*Lord Eskegrove.* There are certain rules which we should never relax. If a man comes to this bar as a witness, he is to swear to what he now remembers, not to what he formerly

ly remembered. How would it answer, were we to suffer the public prosecutor to produce the declaration emitted by a witness in his precognition before the Sheriff, and say to him, "there is a paper which you have signed, read it over, and give it as your evidence."

A man who has been present at any interesting occasion, when he expects to be called upon as a witness, may take notes, and produce them in Court; but this is very different indeed from a narrative taken at the distance of weeks.

I can make no deviation from a general rule, and therefore, I am decidedly of opinion, that the witness is not entitled to use these notes.

*Lord Swinton.* A witness may make use of notes taken down at the time an affair happens, but not when taken down weeks afterwards. There would be no harm in the witness looking them over before he came in here, but to take them out here, is against all rules.

*Lord Dunfinnan* agreed with the above judges.

*Lord Craig* thought the witness might have recourse to his notes, when any particular question was put to him.

*Lord Justice Clerk.* I do not know, my Lords, that we would differ much, if we knew what we were debating about.

That a witness is not allowed to take out a paper, read it over, and then say, there is my evidence, this I allow; but it is admitted by your Lordships,—it is admitted by the Lord Advocate,—that a witness may make use of notes taken at the time the fact happened. Now, where is the difference, though they are taken *ex post facto*, if he is ready to swear that he took them down with a good recollection. I therefore think, that if the witness does not recollect any circumstance, he has a right to look at his notes before he answers the question; and then, if he says upon the great oath which he has taken, that these are facts, they ought to be received in evidence,—not indeed giving the notes as his deposition, but using them only for the purpose of refreshing his memory.

*Mr*

*Mr Hope.* Your Lordship must know, that that was all I asked.

The Court decided by a majority, that the witness was not entitled to look at the notes.

The witness was then recalled, and informed, that it was the judgement of the Court, that he must not take out his notes; after which, the examination proceeded.

*Mr Hume.* Did you mention the opinion you had formed of the pannel to any of the family? I told Miss Kinloch that it was my opinion, that matters were now arrived at that crisis, to make it necessary to confine him. Before you gave that opinion, had you seen the Major? No, but after seeing him, I was confirmed in this opinion, and thought he was actually dangerous to mankind. I imagined that he would do mischief to some person or another; and I thought it, in particular, very dangerous for Sir Francis, as one who was going near him, especially after seeing him prepare destructive weapons, having never observed any tendency of that kind before.

Had you any conversation with Sir Francis on the Monday? Sir Francis sent for me to the garden. I was at that time standing with the pannel in the front of Gilmer-ton house; and he said, "Why go to the garden? Let Sir Francis come to you." I replied, "I will go to Sir Francis wherever he calls me." What was the tenor of the conversation you had with Sir Francis? Sir Francis was exceedingly vexed, and seemed to be affronted at his brother's situation. He seemed *affronted*, did you say? Yes, he appeared to me to feel, as it were, a sort of *family affront*. Was this before the blunderbuss scene?—It was. What further conversation had you? A good deal more conversation passed between Sir Francis and me. What passed after Mr Somner and you were together? Mr Somner and I, in our conversation, agreed that the Major was deranged; and I afterwards informed Sir Francis of the blunderbuss and other circumstances, and pressed upon Sir Francis the necessity there was for securing him, as he appeared to me a most dangerous person, particularly



particularly about that family. Sir Francis seemed to be of the same opinion; and he then informed me, that he had bolted his room-door in the inside on the Sunday night; and I agreed that he was very right in so doing.

Had you any transactions formerly, which led you to suspect that the Major was insane? The Major was owing a debt to a Mr Hepburn, a neighbouring farmer. In May 1789, he left for me with a Mr Veitch, a draft for a sum of money to pay this farmer. When I looked at the draft, it appeared to be for about L. 100 more than was due. But perhaps I had better read the correspondence that passed at the time.—Here the witness read the following correspondence between the pannel and himself, viz.

*Card Mr KINLOCH to Mr FRASER, no date, quoted by Mr Fraser 7th May 1789.*

Mr G. Kinloch's compliments to Mr Fraser, and incloses him a draft for L. 430 on Mansfield, Ramsay and Co. for the discharge of his bond to Mr Hepburn, and which he has requested of Mr Veitch to give him on his arrival from Pencaitland.

*Card Mr FRASER to Mr KINLOCH, 8th May 1789.*

A. F. presents very respectful compliments to Mr G. Kinloch, acknowledging receipt of his favour, inclosing a draft to Mr Hepburn for L. 430. But Mr G. K. will please recollect, that the principal sum due to Mr Hepburn is only L. 300, bearing interest from Lammas 1787. And as Mr H. was told, on the 17th March last, that he should be paid at three months from that date, so the whole sum due to him, upon the 17th June next, will be only L. 328 : 2 : 6. And therefore, the neat way of settling the business appears to be, to draw a bill upon Mess. Mansfield and Co. *for that sum*, payable to Mr Hepburn upon the 17th June.

The

The draft for the L. 430 shall be returned to Mr G. K. when A. Frazer shall know with certainty where to address to him.

*Card Mr FRASER to Mr KINLOCH, 30th May 1789.*

A. Frazer's most respectful compliments to Mr G. K. hopes the letter of the 8th of May has come safe to hand, though it lay in the post-office at Edinburgh until it was forwarded to Moffat by directions from A. F. Begs leave to inform Mr G. K. that Mr Kinloch wishes to pay up the amount of his note of hand, and interest due upon it, and offered the money to A. F. provided the amount could be ascertained; but as neither Mr Kinloch or A. Frazer could exactly recollect the sum, and the period since the interest begun to become due upon it, so Mr G. H. will be pleased to send the note of hand to A. F. and the contents of it, (including principal and interest,) may be credited in part of Mr Hepburn's debt; and in that case, Mr G. K. need only send a new bill for the balance that would remain due to Mr Hepburn, after deduction of the sum of Mr Kinloch's note.

A. F. has taken the liberty to propose settling the business in the manner above stated, as he believes it to be the most easy and convenient way of doing it. And he will send the bill for L. 430 to Mr G. K. whenever he will receive his instructions for that purpose.

*Card Mr G. KINLOCH to Mr FRASER, 2d June 1789.*

Mr G. Kinloch's compliments to Mr Frazer, and as the plan pointed out to him for clearing all accounts, appears to be the most proper, he has sent the note, amounting with interest to L. 70, which deducted from L. 328, amounts to L. 258, which will clear his debt to Mr Hepburn; and for which purpose, he has sent him an order on Mess. Mansfield, payable to Mr Hepburn at 14 days after date; and requests of Mr Frazer to send the note given for L. 330 to Moffat.

P. S. In reading over Mr F's. card, there is a mistake  
in

in the sum due to Mr Hepburn, being at most L. 330, instead of L. 430, as specified by him.

*Card Mr FRASER to Mr KINLOCH, 4th June 1789.*

A. Fraser's compliments to Mr G. K. acknowledging receipt of his favour, with Mr Kinloch's note of hand, and draft for L. 258, amounting in all to L. 328, which will pay up Mr Hepburn's debt.

Returns inclosed the draft for the L. 430, and is sorry that he should have called Mr Hepburn's debt L. 430 in place of L. 330, and of this mistake he had not the smallest recollection.

Mr G. K. will please acknowledge receipt of the draught for L. 430.

A. F. sent a message lately to Adam Mitchell about the balance of the wood money, but he has returned no answer. A. F. thinks, that without distressing Mitchell, some part of this balance may be recovered, indeed Mitchell said so himself.

*Mr KINLOCH to Mr FRASER, 20th June 1789, Moffat.*

I was favoured with your letter, inclosing my draft to Mr Hepburn for L. 430. I must, and do confess myself to have been much mistaken in saying that you stated my debt to Mr Hepburn to have amounted to that sum, but it was entirely owing to myself, in giving a draft for L. 100 more, which escaped my memory.

*Mr Hume.* How was the matter settled at last? It was finally settled in the way I recommended, by a note for the net sum due being sent to me.

Did the pannel after the matter was so settled, ever recur to the subject? Yes, at the distance of several years. In May 1793, when I happened to be at Gilmerton, the Major took me aside, and told me very abruptly, that he could not recollect that a draft or bill which he had left with Mr James Veitch, to be given to me, had ever been returned; or expressed himself to this purpose, and added, that this circumstance had given him very great vexation,

ation, and more than he could tell. To this I answered, that I was astonished at what he mentioned; for I was fully convinced, that no such inaccuracy or mistake had happened on the part of Mr Veitch, who was then no more; and as for myself, that I was sure that I was perfectly clear, and would be able, on looking over my correspondence on the business, to explain it in the most satisfactory manner. Did you accordingly give such information? Yes, on going home, I examined the correspondence already recited, and wrote a card to the pannel, recapitulating the import of it. This card was dated on the 20th of May 1793. Did this explanation satisfy the Major? Yes, I had occasion to be at Gilmerton soon after, when the subject was introduced; and the Major not only declared his perfect satisfaction with the explanation, but seemed much ashamed, and hurt at the want of recollection on his part, which had rendered it necessary; adding, according to the best of my recollection, that, at the time the said money transaction took place, he had been much *distracted in his mind*. Did you not, some years ago, receive a letter from the Major, dated at London, which induced you to suppose his mind at that time very much disturbed? Yes, its contents were so strange as to impress me with the idea, that he was in a desperate situation, both as to his mind and purse. What became of this letter? It having occurred to me, that the same should be immediately communicated to the family, I sent it to Mr Alexander, requesting, that he might show it to the late Sir Francis. Was it returned to you? No. I sometime afterwards asked Mr Alexander, if he had received it, and he acknowledged that he had; but nothing farther, to the best of my recollection, passed on the subject. Do you recollect having any conversation with Sir Francis respecting the pannel, soon after Sir David's death, in which Sir Francis expressed an apprehension with respect to the pannel's situation? Yes, soon after his father's funeral, Sir Francis said to me, that he thought Gordon was getting into one of his unlucky fits.

Mr



*Mr Hope.* I believe the pannel's pocket book is in your custody? Yes.

(The contents of the pocket book were exhibited by the witness.)

*Mr Hope.* Was there found in that pocket book, a copy, holograph of the pannel, of a letter to Mr Francis Anderson, on the subject of the supposed renunciation already mentioned? Yes, here it is.

*Mr Hope.* You have seen, gentlemen of the Jury, that twice over, at the distance of years, the pannel spoke to the witness of this renunciation; and, with this vagary still in his head, he actually wrote to Mr Anderson on the 17th December 1792, a letter, the contents of which you shall now hear.

*Mr Hope* then read the copy of the letter, which was of the following tenor: "As I am now winding up matters, and being ignorant of some things in which delicacy prevents me from asking my father, and in which you can resolve me, I now address you for that purpose. It is to know the tenor of these sheets of paper, which I signed in your presence here in the year 1788, of the contents of which I was and am ignorant. Though it may appear extraordinary, that I subscribed to that, of which I did not know the purport, yet that surprise will cease, when said at the desire of a father, to which refusal I ever was a stranger, it was done. In my request of favour of answer, I hope there is nothing unbecoming honour and business. In this idea I subscribe myself."

*Mr Hope.* Have you Mr Anderson's answer to this letter? Yes, it is likewise here. Do you know this to be Mr Anderson's hand writing? Yes. What is the date of this answer? It has none, but refers to that of the pannel's letter.

Here it was mentioned, that in case this should be thought necessary, Mr Anderson had been cited for the purpose of authenticating his letter, but the Lord Advocate agreed that this was unnecessary; and the letter was then read being expressed as follows: "I am this day fa-

voured with yours of yesterday, and should be happy were it in my power to satisfy you, but I have not the most distant recollection of any papers you signed in my presence, in the year 1788. I observe from our books, that all transactions with regard to your sale to Lord Wemyss of Woodhall, was finally closed at Whit-funday 1786, and the balance paid you on 27th May 1786. Since which there has been no transaction betwixt us. Will you make my best respects to Sir David, and tell him, he may depend on seeing me early in the next year. And I shall be happy, if, from any circumstance you can bring to my recollection, any thing that may tend to satisfy you as to what you wish to know; but this I am certain of, that I never presented any paper to any person to sign in my life, without explaining the nature of it to them, and making them read it. My best wishes ever attend you all."

HUGH DODDS, *Clerk to Mr Frazer, examined by Mr BURNET.*—

Did you see the pannel in Haddington Jail? Yes. I saw him there on Wednesday the 15th of April, in company with Mr Hay Smith. What conversation then passed? Nothing particular; only the pannel expressed some dissatisfaction with his situation, there being no fire in the room.

When did you again see the pannel? I waited on him with a written message from Mr Frazer, in answer to several messages from the pannel. What was the import of this message? It informed the pannel, that he might give any message to me which he might have occasion to send on business; and he would get an immediate answer. What did the pannel say, on receiving this message? He said, that he supposed he might understand he was never to see Mr Frazer again; and that he could not get a distinct answer, unless he saw Mr Frazer himself.

Did you again see the pannel? Yes, on the Tuesday thereafter. What was the occasion of your seeing him then?

then? To be present at the intimation of a petition for appointing managers to the estate of Gilmerton. What passed? The pannel read over the petition, and (on my explaining the nature of it,) said, he had no objection to it, and signed a consent, which I wrote out. Did any thing further pass? Yes; he proposed to keep the petition, and to consider of the matter for forty-eight hours; but I declined leaving the petition with him, and, at his desire, scored out the consent. Did he, notwithstanding, agree to the application? Yes, before I went away, he desired another consent to be written out, and signed it.

*Lord Justice Clerk:* When you had occasion to see the pannel, did he speak rationally and coherently? Yes.

*Lord Advocate.* There are a variety of witnesses whom I have not brought forward, and I do not intend to bring forward.

As for one witness, the first in the list annexed to the Indictment, namely, Mr Alexander Kinloch, the Jury may have expected to see him here; but after the evidence which has been adduced, I am not disposed, and consider it unnecessary to put that gentleman upon so very disagreeable a piece of duty.

As to the other witnesses in the list annexed to the Indictment, if there are any of them whom my brother wishes to bring forward in exculpation, it will be competent for him to call upon them. But, on the declaration which the pannel emitted before the Sheriff being read, I here close the evidence upon the part of the Crown.

The counsel for the pannel having admitted the identity of the Declaration, the same was then read. It was expressed in the following terms:—

## DECLARATION.

“ At Edinburgh, the 30th day of May 1795 years.  
 “ The which day, compared in presence of James Clerk,  
 “ Esq; Advocate, his Majesty's Sheriff-depute of the Shire  
 “ of Edinburgh, Sir Archibald Gordon Kinloch of Gil-  
 mer,

" merton, who being examined by the Sheriff, and being  
 " informed by the Sheriff of the reason of his be-  
 " ing brought before him, and having likewise acquaint-  
 " ed him, that it was in his option, either to refuse to  
 " answer those questions that might be put to him, or to  
 " return such answers as to him might seem best, he  
 " answered, That there was no question could be put to  
 " him, but what he was ready to answer in the face of  
 " Heaven:—And being interrogated, If he recollects  
 " what happened at Gilmerton on the 15th of April last?  
 " declares, That he has a very indistinct recollection of  
 " what then happened, as he was then quite deranged.  
 " Interrogated, If he recollects having fired a pistol on  
 " the morning of that day, and at whom? Declares, That  
 " he has a very confused recollection of it, but does think  
 " he fired a pistol; but where, how, or at whom, he does  
 " not recollect; and that he was in such a state of de-  
 " rangement, that he is now convinced, that he would  
 " have fired the pistol at any person that then came in  
 " his way. Interrogated, as the declarant now appears  
 " to consider himself in a settled state of mind, and  
 " recollects what has happened, he is desired to  
 " say at what period his derangement ceased? De-  
 " clares, That he cannot say when he recovered  
 " from his deranged state, but that he has been  
 " greatly better since he has been brought to Edinburgh,  
 " although still at times, when particular thoughts come  
 " across him, he feels a temporary derangement. Inter-  
 " rogated, If he is sensible at what time his derange-  
 " ment commenced? Declares, That he cannot say; but  
 " he felt it coming on for sometime before the unfortu-  
 " nate accident happened. Interrogated, If he was  
 " satisfied with his father's settlements? Declares, He  
 " was so, and never expressed any dissatisfaction at them,  
 " but was grateful for them. Interrogated, If he ever  
 " complained of any papers of his father's having been  
 " burned after his father's death? Declares, He does not  
 " recollect of having done so. All this he declares to be  
 " truth. Emitted also in presence of Mr William Scot,  
 " Pro-



“ Procurator-fiscal of the county of Edinburgh, Joseph  
 “ Mack writer in Edinburgh, and William Stephens  
 “ Sheriff-officer in Edinburgh, and read over to, and ad-  
 “ hered to by the declarant.”

## EXCULPATORY PROOF.

*Lieut. Colonel SAMUEL TWENTYMAN examined by Mr HUME.*

—Are you acquainted with the pannel, Sir Archibald Gordon Kinloch? Yes.

At what time, and on what occasion did your acquaintance commence? In the year 1778, Sir A. was a Captain in the 65th Regiment, I a Lieutenant in the 18th at that period; the two regiments were encamped at Coxheath, and in the same Brigade. This circumstance naturally produced a frequent intercourse between the officers of the two regiments, and I then became acquainted with Sir Archibald. In what estimation was the pannel then held? I can affirm, that no officer was more universally esteemed and beloved than he was throughout the whole line, by both officers and men; his generosity, good temper, sociability, and general good conduct, made him very popular both in his own and other regiments.

Had you afterwards any opportunity of being still more intimately acquainted with the pannel? In the year following, I was nominated by the late Duke of Ancaster to a company in the Regiment his grace was then raising; and on the much lamented death of that amiable young nobleman, Sir A. succeeded him as Major. This, by placing us both in the same regiment, gave me an opportunity of observing Sir A. more minutely; and having sailed with him in the same ship part of the way to the West Indies, that opportunity was increased: I can only repeat what I have  
 said

said in regard to his general character ; and in all those different situations, I found him friendly, liberal, sociable and humane, possessing every good and gentlemanly quality.

At what island were you landed ? We were landed at St. Lucia, and there stationed. Was not the pannel seized with a fever at St Lucia, and what were its effects ? On that island Sir Archibald was seized with a most malignant fever, which deprived him of his senses. I have seen him in his bed in the highest state of delirium, held down in his cot by a soldier on each side, and, to use a common phrase, raving mad. I had several opportunities of seeing him while he remained on that island, and while he laboured under that dreadful malady ; and I have frequently been present when he was talking of me, and did not know I was there.

Do you recollect Whether the pannel was removed to a different island, who accompanied him, and any occurrences on the voyage ? It being thought adviseable to have him removed to Barbadoes for change of air, as the only possible means left of saving his life, Lieutenant Fawcett, who all along kindly attended him, requested me to permit him to accompany Sir A. to Barbadoes, which in course I granted. During the passage, Sir Archibald's servant caught the fever, attended with the same symptoms, and, in one of the paroxysms of it, threw himself overboard, and was drowned. I have had several conversations with Lieutenant Fawcett upon this subject, after our return to England, and he was of the same opinion with myself, in regard to the decided derangement of Sir Archibald's intellects, undoubtedly the effects of this fever. Lieutenant Fawcett is now in India.

On the pannel's return to Europe, did you remark any change upon him ? I was myself particularly struck with the manifest change I perceived in Sir Archibald, on my first seeing him in England, after this fever ; not so much from a change on his outward appearance, but from a total alteration in his conduct, manners, and conversation.

Did you purchase the pannel's Majority ? Yes, in the be-

beginning of 1783. What observations did you then make on his behaviour? We dined several times together during the negociation. At these meetings, I observed an uncommon change in Sir Archibald, a degree of flightiness, a wildness in his appearance, and a kind of conduct perfectly different from what I had observed in him, previous to the date of the fever; as, prior to that, Sir Archibald's manners in society were affable and conciliating. After my purchase from him, many opportunities of seeing did not occur; and, convinced of his derangement, I rather avoided than sought them.

Do you recollect any particular opportunities of seeing the pannel after this period, and what did you observe in his conduct? About four or five years after the fever, I was on a visit in the neighbourhood of Lincoln. Sir Archibald came to that town. He sent a post-boy to me with a note, begging I would come over immediately on very particular business. When I came to him, he had no business whatever, nor would tell me what he was about, whence he had come, or where he was going. Do you recollect seeing him at Lincoln after this period, and any particulars which then occurred? Yes.

The year following, Sir Archibald came a second time to Lincoln, when his conduct was much more extraordinary than on the former occasion. A message was sent to me from one of the inferior inns, that a person begged to see me immediately. I returned for answer, that not being in the habit of going to people, whose name or business I was unacquainted with, the person must be more explicit, before I could determine about calling upon him. Several verbal messages passed to the same effect. At length a note came, urging me to come immediately; that it was business of a most particular nature. I was excessively surprised at this note, and curiosity led me to go, and see who possibly could be the author. My surprise was still further encreased, when, on entering the room, I beheld Sir Archibald. I questioned him, how he could be so ridiculous in not sending me his name? He replied,

plied, that he had something very particular to communicate to me; and as he did not wish to be known, he would not send his name. I begged to know what this business was. He went to the door, to observe whether it was fastened; and then began a long story, to me totally unintelligible, flying from one thing to another in the most incoherent manner, and talking of projects that he had, none of which he would explain. Sir Archibald dined at my house that day. Colonel Gardiner, a very gentlemanly and well-bred person, was of the party, a perfect stranger to Sir Archibald. To this gentleman, without any apparent cause whatever, Sir Archibald, at first sight, conceived an absolute antipathy, and behaved to him very rudely and in the most boisterous manner and totally different from his former conduct; yet, on a sudden, his disposition changed so much, that he jumped from his chair, threw his arms about Colonel Gardiner's neck, kissed him, and seemed as much pleased with the Colonel's company, as before he had shewn aversion to it.— When he left Lincoln, he would not tell me where he had come from, or where he was going. The people of the inn thought him a most extraordinary being: they judged from his way of speaking to them, and odd manner of conducting himself.

When, and where did you last see the pannel; and what did you then remark? The last time I saw Sir Archibald was near the Adelphi. He formerly used to be very particular in his dress, that is, remarkably neat and clean; he then was quite otherwise, his hair uncombed, his shoes and stockings excessively dirty, (not apparently dirt collected from that morning's walk,) but as if they had not been cleaned for some days. We had some conversation, but his speech was so confused and incoherent, that I could not understand him. I was excessively glad, upon this occasion, to get rid of him; for it was distressing to see him so changed, so different from what he formerly had been. I may have seen him casually two or three times previous to the above meeting, and was confirmed in my opinion, in regard to his derangement; but, particularly,



icularly the last time, I thought that the malady had encreased. Do you think that the fever in the West Indies was the cause of this derangement? Certainly. Did it ever appear to you that the pannel entertained the same notion himself? I have observed him at times put his hand to his head, complain much, and say, that he felt pains there, the effects of the fever. He spoke of being troubled with the blue devils, and at those times appeared very uneasy in his mind. I once asked him, when seeing him in that situation, Whether he repented of his having fold out of the army? He replied, "No, no, 'tis not that; 'tis my head; I never shall recover that "St Lucia fever."

Had you ever any conversation with other officers in relation to the pannel's disorder, and did they entertain the same idea of it with yourself?—In conversations I have had with officers, who have known Sir Archibald before his going to the West Indies and since, particularly General Tottenham, Colonel Fitch, Lieutenant Fawcett, and others, they have agreed, that he never recovered that fever, and that he was deranged by the effects of it.

In my own mind I never had the smallest doubt, that Sir Archibald's intellects were deranged in consequence of that fever, and that he had periodical attacks, that rendered him insane, and consequently not master of his own actions; as I am convinced, must have been the case at the period of the dreadful catastrophe, on account of which he stands charged. I formed this opinion from having known him previous to that fever, the change it caused in him, and the observations I made on his subsequent conduct.

MAJOR JOHN MACKAY, *examined by Mr RAE.*—

Do you know the prisoner at the bar? I do. How long have you been acquainted with him? My acquaintance with my unfortunate friend, Major Gordon Kinloch, commenced in Ireland in the year 1767, when he joined the 65th regiment at Corke as an Ensign; to which regiment I then had the honour to belong. He was particularly

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recommended to my care by the late General Mackay, who at that time was our Colonel. It was there, that the foundation was laid of that strict friendship and intimacy, which have ever since uniformly subsisted between us. He continued with us until autumn 1779, when he obtained the majority of the 90th regiment, and was soon thereafter ordered to embark for the West Indies. Perhaps, this may be the proper time for me to mention the footing upon which Major Gordon lived with the 65th, during the twelve years he served in it; and therefore, I take this public opportunity of saying, that he was friendly, generous and benevolent, universally beloved and esteemed by every officer and soldier in the regiment, and when he left, it as universally regretted.

During the period which you have mentioned, did you ever observe the pannel liable to fits of bad humour, or jealousy? No; I do not recollect, that during the whole of that period, I ever saw him seriously out of temper.

After that period, did you come to understand, or had you occasion to remark, that a material change had taken place in the prisoner's disposition, and that he was at times liable to derangement of mind? I learned afterwards, that the Major had been attacked with a very violent and dangerous fever in the Island of St. Lucia, which affected his brain much; and I have great reason to believe, that he has never entirely got the better of the effects of that malady; and I am the more confirmed in this belief, from the following facts, which I beg leave to state to the Court.

After the 90th regiment returned to England, at the close of the late war, I met several of the officers of that corps, who all agreed in opinion, that the Major had been occasionally deranged in his mind, and that his health had never been thoroughly re-established since he had that dangerous fever, to which I have alluded.

In the year 1783, I met him in London, where we were much together; and although I could perceive that he was not so connected and coherent in his discourse as

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he formerly used to be, yet I was not sensible at that time that he had any deranged symptoms about him.

The first time that I had occasion to make any observation upon this afflicting subject, was at Mr Charles Dalrymple's house at North Berwick, in 1785. I accompanied the late Sir David Kinloch, Miss Kinloch, the late Sir Francis Kinloch, and the Major, to pay Mr and Mrs Dalrymple a visit. In the course of the evening, Major Gordon and myself sat down to play a rubber of whist at the same table; and I observed that he had been throughout the day in as good health and spirits as I had ever seen him in. After we left off cards, we walked out of the dining room together, when I was much surprised indeed to find that he had entertained an idea (as groundless as it was improbable, nay, I may add, impossible,) of my having affronted him, by endeavouring to place him in a ridiculous point of view, and to make him the butt of the company; he said that I was the last man from whom he expected such unfriendly usage; and that he never would forget it.

The effects, which I had been told, his West India fever sometimes produced in his mind, struck me so very forcibly, that I was instantly convinced, he was then in a certain degree deranged: and although I used every friendly argument in my power to remove his suspicions, which were as groundless as they were unkind and unjust, yet these had no effect.

Next day, I was obliged to come to Edinburgh, and in consequence I wrote a letter to Mr Duncan M'Millan, (who was very intimate at Gilmerton,) desiring him to shew it both to Major Gordon, and to the late Sir Francis Kinloch, in which I explained the whole matter; and Mr M'Millan wrote me that he had done so. Sometime afterwards, I met Sir Francis; who, upon the subject being mentioned to him, said, that he was perfectly sensible that I had not given his brother the smallest cause of offence at North Berwick; that he was convinced his temper and disposition were totally changed; that he had often observed him to behave in a most inconsistent manner; and

and that he attributed all this to his West India fever; for he was not the same man since his return to Europe, that he had been before he went out to the West Indies.

In Summer 1790, I happened to be one day in the coffee room at Greenock, and was much surprised to see Major Gordon enter. I immediately perceived a wildness in his looks, which I had never seen before. He told me, that he had posted all night from Berwick without sleeping, to find me out, in order to communicate to me matters of the utmost consequence to himself, as he looked upon me to be his most confidential friend. I asked him what he meant? upon which he took a letter out of his pocket, and gave it to me, saying, "Read that," and then he convinced how ill I have been treated by "my whole family." This was a letter from his brother Mr Alexander, acquainting him with the death of their brother Captain David, very expressive of the distress the family were in upon that melancholy occasion, and full of affection towards the Major himself, earnestly entreating him, at the desire of Sir David and the rest of his family, to return to Gilmerton. Upon my observing, that this letter was very foreign to the subject he had mentioned, he replied, "That letter is a sufficient proof of the truth I have told you, and I have no other proof." At this time, the Major appeared to me to be quite deranged in his mind. I told him, that he seemed to be much indisposed, and pressed him to go to bed to try to get some sleep, after his fatiguing journey, and also to remain with me at my sister's house, who lived in the neighbourhood of Port-Glasgow; but all this he positively refused to do, and said, that he was obliged to return immediately to Berwick, where he proposed sleeping that night, and instantly set out, notwithstanding I used every argument in my power to dissuade him from his purpose.

The next time the Major appeared to me to be in a deranged state of mind, was in Dumbreck's hotel in Edinburgh, four or five days before the death of the late Sir Francis Kinloch.



Kinloch. One of the waiters having told me he was in the house, I immediately went to him, between seven and eight o'clock in the evening: He was then going to dinner, and appeared to me to be totally depressed in his mind, and quite incoherent in what he said. I was obliged to ask him the same question two or three times before he would make me any answer, and then he used to start up as if something had alarmed him. He told me that he had been extremely ill indeed, ever since the death of his father, who had made what he (the Major) considered a handsome provision for him, and with which he was perfectly satisfied: At this time he spoke of his brother Sir Francis with great affection. The Major told me, that he was obliged to set out early next morning for London upon particular business. I remonstrated with him against undertaking such a long journey in his present state of health, and advised him to send for, and consult some medical gentlemen: I likewise told him, that I intended setting out myself in a few days for Buxton, and pressed him much to wait for me, and that we could travel so far together; but he would not listen to any thing I proposed, and set out next morning in a post-chaise, with an intention, as he told me, to dine at Gilmerton on his way to London.

Did you think that the Major's situation on this occasion proceeded from intoxication? By no means. He called for a bottle of wine, and drank only a few glasses of it. Indeed his situation made such an impression on my mind, and I was so much convinced of his deranged state, that when I went home, I told my sister, (who was well acquainted with the Major,) that I should not be surprised if he committed some rash action against himself.

When did you again see the Major? I went to the Major the day after he was brought into Edinr. Jail, at his own request, and found him as calm, rational, and collected, as I ever remembered him, and perfectly sensible of the deplorable situation which he was then in. He said, he had been much deranged in his judgement for a considerable time before the fatal accident befel his brother, and that he did

did not know he had a pistol in his hand, till he heard the report. I called upon him two days afterwards, in company with Dr James Home, and found him, (as I thought,) quite delirious and furious; and, when we left him, I had some conversation about him with Dr Home, who was of opinion, that if the Major's fever continued much longer, it would be adviseable to put the strait-waitcoat upon him. When I went in upon this occasion, the Major was walking rapidly about the room, which was very small, as if for a wager.

*Lord Advocate.* You have told us, that, when you saw the pannel at Dumbreck's hotel, he was alarmed, and that you had to ask the same question two or three times over before he gave an answer. Now, when he did return an answer, was it a rational and distinct one? It was generally pretty much so, but expressed with a degree of melancholy and wildness which I never observed before.

*Captain MILLER examined by Mr MONYPENNY.—*

Are you acquainted with the pannel? Yes. How long have you known him? About twenty-three years. I joined the 65th regiment as an Ensign in the year 1771; and Sir Archibald, then a Lieutenant in the same regiment, joined us at Halifax, Nova Scotia, a year or two after; and he afterwards purchased a company in the regiment. In what estimation was the pannel held in that regiment? During the whole time I knew him in it, he was universally beloved and respected by all the regiment, both officers and men. When did the pannel leave the regiment? In the year 1779, when he was promoted to the Majority of the 90th regiment, along with which he went to the West Indies.

When you next saw the pannel, did you observe any change upon him? When I saw him after his return to Britain, he informed, me that he had been attacked by a violent fever at St. Lucia, which had greatly impaired his health. Did you see him soon after he returned? I did not see him till 1789. We met by chance in the Strand. I was surpris'd to find him so much altered. Formerly he was a most conversable gentleman, the mildest and most humane

humane character; but now I observed a most remarkable change. Was the alteration in his manners, or in his bodily appearance? Both. He was very slovenly in his dress, and his hair, which was formerly a fine brown, was now turned white. He often told me, that he had always been disturbed in his mind since he had the fever in the West Indies.

Do you think the alteration in his temper might be the effects of intoxication? No. We dined frequently together in coffee-houses in London, when we never drank above a bottle of wine between us, and I never saw him but sober; though his conversation was often wild, by what I had been used to.

Had you occasion to see the pannel in 1790? Yes. In October that year, I received a letter from him, dated from a hotel in Oxford road, pressing me to come to him immediately, as he was in a very bad state of health, and had no relation or acquaintance in the world that he cared for but myself. I was then at Huntingdon recruiting, but immediately went to London. On calling at the hotel whence the letter was dated, I could get no account of him, except that a strange sort of a gentleman had staid there for a few days, and had gone away without saying whither. I however, found him at last very ill, in bed, at old Slaughter's coffee-house in St. Martin's Lane, kept by one Reid. I staid with him a few days in the same house till he got better, and then returned to Huntingdon.

When did you next see the pannel? In November following, he came down to Huntingdon to see me, and staid two or three days, and then set off for Scotland. Did you remark any thing particular in his conversation at this time? He frequently repeated to me his distressed situation of mind; and he told me some odd stories of himself, such as that he had gone about England in stage-coaches and stopped for days, where strolling players were acting in a barn, when he engaged himself as fiddler to them, and many other acts of that sort, which clearly proved to me his derangement of mind. At this time he was dressed

in black (I believe one of his brothers had died recently before); and he told me, that he would never alter the dress, as he was determined never to mix with the world again; and he actually sent many of his coloured clothes to my lodgings, to be disposed of as I might think proper.

*Lord Advocate.* When you conversed with him, were the answers he returned to your questions rational and coherent? Sometimes he returned correct answers, at other times they were quite incoherent.

### MISS KINLOCH.

This lady was in the Outer Parliament House. Mr Hope waited upon her by permission of the Court, to inform her, that she was the next witness he meant to adduce. He remained only a few minutes, and when he returned, addressed the Court in the following terms.

MY LORD,

I am now under the necessity of calling upon your Lordships to review your former judgement. I have been with Miss Kinloch, and I found her in a condition which I cannot describe. In such distress, that, by heavens! were it my own life that was depending, I would not ask her evidence. She has declared to me, that unless she is permitted to look at her notes, she cannot promise to answer a single question. Will the Court, under the these circumstances, adhere to the judgement already given?

*Lord Advocate.* In the conduct of this trial, as in all others which it has been my lot to manage, I have been guided by the principle of public duty. However much I may be affected by the distressed and melancholy situation of the family, I cannot discriminate between the case of this lady, and that of the poorest woman in the kingdom. I must not yield to my feelings: And I will not, on any consideration, deviate from the line of equal and impartial justice.

That he or she, who, upon a question being put, does not recollect,



recollect, may look at notes taken at the time, and then make answer, is what I shall not oppose; but, my Lord, if any thing more is meant, I do say that it is contrary to the practice of this Court, and would be establishing a most dangerous precedent. If, therefore, this lady cannot give her evidence in this manner, I must, however painful the duty may be, object to any deposition which is made by reading from notes of another kind.

*Mr Hope.* My Lord, since I began to make the nature of law my study, I have always thought, that if there is one maxim which ought to be held more sacred than others, it is, that mere form shall never stand in the way of truth and justice. Now, my Lord, how are these to be obtained, if witnesses are to be precluded from giving their evidence, in the only manner in which they possibly can give it?

We have brought forward many facts with regard to that species of insanity with which the pannel is afflicted. We have traced him in his wanderings about the country, but do your Lordships imagine, that these were the only occasions on which his disorder appeared? Would his own family proclaim to the world his melancholy situation? Is it not to be supposed, they would rather be careful to conceal it? My Lord, in the case of *occult crimes*, the members of a family are always admitted to give evidence, because the truth cannot be obtained in any other way: Now, although the insanity of the prisoner has accidentally been observed by others, yet no one can doubt, that it must have been much more frequently observed by his own family. It is therefore an *occult fact*, which although it has been *partially* proved otherwise, can certainly be completely established only by the evidence of members of the family. The counsel at the table, are not the only counsel for the prisoner, your Lordships are bound as much as we are to see that his cause is not injured;—and is it reason or justice to refuse to allow this lady to look at her notes, when she has declared, that she cannot give her evidence in any other manner.

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My Lord, it is not for Miss Kinloch, it is for her sex I ask it. Must not any woman of delicacy be confused and agitated at appearing before this public Court? How much more so on such a melancholy occasion, for which this Lady comes. When she is in such a situation of distress,—a situation, which were she not in, I am sure both your Lordships and the Gentlemen of the Jury would think it a much stronger objection to her testimony, than giving her evidence from notes. Will you, or can you deny her the assistance necessary for counteracting the confusion and agitation, which it would be a crime in her not to feel?

But it is not to your feelings, it is to your justice I appeal, For what is the objection but a mere matter of form? Your Lordships have said, that when she is on the other side of that wall, at the very moment before she enters this Court, she may peruse her notes; but when she comes to the foot of this table, that is, at the very moment, when she stands most in need of her notes, she is not to look at them. Shall it be said in this free country, in this enlightened age, that truth shall be withheld upon such frivolous pretences? Upon such a mere fiction, nay what I had almost called a quibble of the law? My Lord, were I the conductor of this prosecution, I declare, I would rather abandon it altogether, than support it by such means.

The Court determined, that Miss Kinloch might look at her notes, and then give her evidence upon oath.

*Lord Justice Clerk.* I was always of opinion, that witnesses had a right to look at their notes for the purpose of assisting their recollection; but at the same time, I think Mr Hope was rather too warm, when he said, that your Lordships were putting form in the way of justice. It was not on account of form that the Court decided against a witness reading his notes, but from a desire of keeping pure the channels of justice, by suffering no practice to be established, which might tend to corrupt them.

Miss Kinloch was now brought into Court, attended by

by two ladies in mourning, and was seated at the foot of the table below the bench. She was examined by *Mr Hume*, who repeated her answers aloud to the Court and *Jury*; the Lord Advocate of his own accord having offered to take them in this way, upon seeing that the witness was agitated, and unable to raise her voice. She deposed, That she had frequently heard her father Sir David say, that the Major had never been found since he came from the West Indies. That one day, about six or seven years ago, she heard Sir David enquire for the Major, and being informed that he was gone for London, without giving any previous notice, he said, "That poor mad creature Gordon, is much raised at present; and I am, afraid that one day he will be in a state of confinement." That on several occasions, when Gordon was doing strange and unaccountable things, Sir David has said, "Poor Gordon's head is very much turned," and other expressions to that effect. And in particular, she remembers that on one occasion, when the family was at Wooler, and Gordon was hastily taking leave of them, Sir David said, "Poor Gordon, his malady is coming on." That Sir David once told the witness, that Gordon had taken it into his head that he had signed a renunciation of his inheritance, and this he mentioned as a proof that his head was turned. That the witness was from her own observation convinced, that these remarks of her father's were just, and his opinion too well founded. That in the end of March and beginning of April last, the witness observed his malady plainly coming on, and gradually gaining ground, and becoming more violent than she had ever seen it before. That the appearances about him were so alarming, that she apprehended danger to her own life, and was afraid to be alone with, or near him. On the Saturday, Sunday, Monday and Tuesday, preceding the fatal accident, she never saw the symptoms of his malady so violent; in so much, that she advised Sir Francis to send for medical assistance, and to have him secured lest he might do harm to himself or others; and she thought this  
advice

advice so necessary, that she always kept out of his way, and had for weeks before locked the door of her bed-room for fear of his coming in upon her. That nothing occurred afterwards, to make her think that this advice was groundless or unnecessary, but on the contrary, every thing confirmed her in her opinion. That on the Monday the Major told the witness that he had taken poison, and took out his watch, and requested her to take it from him as a keepsake, for he had not many hours to live; and at this time he was in a state of extreme agitation. Upon the Tuesday, when she went up to her chamber, she desired the servants to hold Gordon's room-door fast, while she passed it, and slipped by, as she was afraid he might follow her, and perhaps make away with himself before her face. When he said he had taken poison, she did not at the time believe him, but she afterwards found, that he had swallowed a whole phial of laudanum, which he had taken from a cabinet in her room. That she would not, on any account, have retired to her room on the Tuesday night, if she had in the least suspected that Sir Francis himself meant to seize him, for she knew the danger of it; and that Sir Francis had told her, that the Major was more quiet than he had been, and that they would not seize him that night.

Being interrogated by the Lord Advocate, the witness deponed, That the family never proposed to take any steps against him as an insane person prior to the Sunday. On Tuesday Sir Francis told her, that Gordon had been out all night wandering in Beanton wood, and was raving mad.

Again interrogated by Mr *Hume*, she deponed, That on the Tuesday evening, the Major more than once attempted to break into her room, which was locked against him; and on these occasions, he complained that the witness refused to see him, when Sir Francis saw him, and was so kind to him.

*Mr Hume.* Though I have reason to believe, that a more detailed and particular examination of Miss Kinloch would bring out many strong circumstances in the pannel's  
favour,



favour, and though it was at first my intention to have proceeded in that manner, yet, in her distressing situation, and as I hope the case will not require it, I shall forbear to press it farther, and content myself with the few general questions which have been put.

JOHN WALKER, *Tenant in Beaufort, examined by Mr HUME.*  
Did you see the pannel on Tuesday the 14th of April? Yes. You will endeavour to recollect what passed? About a  $\frac{1}{4}$  after five in the morning, as I went out to yoke, I saw a gentleman walking near my house, which is about a mile from Gilmerton. He was dressed in black, and cried *halt*. This gentleman turned out to be the Major. Was there any body with him? No. What further passed? I shook hands with him. He seemed much fatigued. His clothes were disordered, and his appearance confused, and I invited him into the house,—took him up stairs to a room, and recommended a bowl of tea and a bed. His stockings were very wet, and stuck to his feet and legs.—I at first conjectured, that he had been up all night at Mr M-Leod's, but when I hinted this, he said in a surly manner, *John, Don't ask me where I have been.* I rubbed his feet and legs until they came to some heat, and then he lay down upon the bed. He said in an angry tone, before I left him, that he would not be wakened.

About five o'clock in the evening, however, being a good deal alarmed, I went up stairs to see if he was awake, and knocked at the door, which I found was barricaded within, *now says I to the Major, it is five o'clock; It is time that you were up.* He rose, and removed some chairs, with which he had barricaded the door, and then he opened the door a little, and looked out with a wild appearance, having two pistols in his hand. He asked me, after I went into him, If my wife had any laudanum? I said, perhaps she might have a little; but he answered, that he would take 350 drops, and that nothing less would do, for that he wanted an everlasting sleep, never to waken. Then he walked up and down the room  
in

in great agitation, sometimes pointing a pistol to his left side, and pressing the muzzle under his ribs towards the heart, and at other times pointing it to his ear or his forehead. I attempted to expostulate with him, but he said, (and here the witness used a loud and positive tone.)

"*Don't interfere, John.*" He then sat down, and desired me to draw a chair near him, after which he beat upon his breast, and exclaimed, *Ab! John.* He next presented a pistol to himself, repeating again, "*Don't interfere John.*" I asked, if any of the family had offended him? He made no answer to this question, but said, "*Above all things, I would wish to see William Reid and Sandy Kinloch.*" He also said, he would take some tea.

I went down stairs to order my wife to get the tea ready, and to send for William Reid, and I then said to her, "If a pistol goes off, be not surprised, for the Major is deranged in his judgement, and I am afraid, he will make away with himself."

I took up the tea.—I poured some into a saucer, and held it to his lips, for he was not in a condition to carry it to his head himself. It was hot, and he said, "John you have burnt me." He drank three saucers full of tea, but did not eat above an inch of bread. All the while I was helping him to the tea, and holding the saucer to his head, he held a pistol, (which I saw, and heard him cock,) to my side, within three inches of my belly, keeping his thumb upon the cock, and his finger at the trigger; I was much alarmed, but when I went down stairs, I did not let my wife and daughters know the danger I was in.

When did William Reid come, and what passed? He came soon after. I informed him of the situation in which the Major was, and desired him *to tell Sir Francis to send all the men in Gilmerton to seize him, for he would do mischief either to himself or somebody else.* William Reid went and knocked at the room door. The Major opened, and set it a jar a little, and looked out presenting a pistol before him. William retired some steps down the stair at first;

first; but afterwards, on the Major pressing him, and assuring him that he would not do him any harm, he went into the room; but in a short while came down stairs, and went away. The Major came down stairs soon after, and said, "John you must give me a convoy." I went out with him, but we had not gone far when passing by the stack-yard, he said, "John, there was my bed among the stacks last night." I answered "while there was a bed in my house, I am sure you had no occasion to lie there." He desired me to walk before him; but hearing him cock a pistol at my back, I was alarmed, and turned about. He said "Are you afraid John," I replied, "No, I am sure, I have no reason to be afraid of Major Gordon." Soon after I heard him let the pistol down to the half-cock, and in a little while I heard him cock it again, and in this manner we walked on together; the Major keeping behind me with the pistol. I now began to look about for an opportunity to escape, but finding I could not safely get away, I went on, until we came to a walk, which I knew the Major was fond of. I there took leave of him, under some pretence, and returned home, very happy to have escaped as I did.

WILLIAM REID, *gardener at Gilmerton, examined by*  
Mr HUME.—

How long have you been gardener at Gilmerton? For 23 years. Had you occasion to see Major Gordon on Monday the 13th of April last? I saw him about one o'clock in the afternoon. What passed then? The Major was walking from the house towards the garden, when I heard him call to me by name pretty sharply; on which I turned back and went up to him, and took off my hat, which he desired me to put on again. The Major then, with a good deal of agitation, felt first his waistcoat pockets, then his breeches pockets, and then his waistcoat pockets again; and seemingly much disappointed at not finding what he wanted, said, with a melancholy tone, "I thought I had had something;" upon which I (think-  
ing

ing that he intended to give me something,) begged to be excused, and said, that the Major had often been kind to me and my family. The Major then took several strides backwards and forwards, seemingly in great agitation; whereupon I said, that I was sorry to see him not well; but he made no answer, and still continued to stride backwards and forwards, and I left him. Did you see the Major on the afternoon of Tuesday the 14th of April? Yes. About five or half-past five, a servant maid of Mr Walker's came down with a message from her master, desiring me to come up to Beanston immediately, for Major Gordon was there in a very deranged state. Did you go, and what passed? I met Mr Walker at the door.—He took me aside, and told me, that the Major had come there between five and six in the morning, and that he had arms with him. Then Mrs Walker came out, and desired us to go up stairs immediately. Mr Walker rapped at the door, and told that I was there; on which, the Major just opened the door a few inches, looking out with a suspicious countenance, and a pistol in his left hand, and again shut the door. He had a very raised, wild look, and his eyes had a very particular appearance. His hair was hanging loose, and his stockings off. I saw the pistol, and told Mr Walker, that I would not go into the gentleman in that condition. Did you afterwards go into the room where the Major was, and what passed there? After I got down a step or two of the stair, the Major again opened a little bit of the door, and said, "Is that you, William?" I said it was. He then opened the door, and pressed me to come in. I refused, unless he would lay aside the pistol; on which he said, "Upon my 'my honour, William, I'll do you no harm."—I again begged him to lay aside the pistol, which he agreed to do; and I heard a sound, as if he was taking it from cock to half cock. When I went in, the Major immediately clapped to the door, and put a chair upon the handle of it, so as to have some purchase. I still observed the pistol in his hand, and was very uneasy about it; when



when the Major told me not to be afraid, and repeated that he would do me no harm. I said, it was his weapons that I feared and not himself; and that, if he would lay them aside, I would do any thing for him, or go any where with him. Upon which he asked me If I was sure I did not mean him any harm? And although I assured him that I did not, yet he was not satisfied, till he had caused me swear by the God of Heaven, that I would do him no hurt. He then threw two pistols, with considerable violence, into the bed. We then sat down; but the Major immediately rose, and came forward, and laid hold of me with both hands by the breast, and stared broadly in my face. He said, "Where do you think I have been all night William?" I answered, "I don't know, Sir." He said, "in Beanston planting; I had a light from heaven which appeared upon a bush, and I heard it crackle." I said, "like the crackling of thorns, Sir." He answered, "Yes, but it was not consumed. The Major then sat down again, and took out a piece of paper, and said, "William, you have a family. This will be of some use to them." I at first refused it, but, on the Major's insisting, took it, and said I would keep it till I saw him again; on which the Major said, "you will never see me again, William:" and after some incoherent conversation, he said, "the prophecies of heaven must be fulfilled." I observed that heaven had never prophesied, or ordered, that a man should make away with himself. In the course of this part of the conversation, the Major took a small phial out of his waistcoat pocket, and said, "I have taken all this, and yet am still here." I got the bottle into my hand, and observed, that it still contained a drop or two of a deep coloured liquid; but the label was all torn off, except the border which was red. I asked to keep the bottle, but this the Major positively refused. What further passed? He asked me to blood him, but I answered, that I had not my lancets; and was very much alarmed in case he should detect me. He then turned sick, and went towards the bed, and reached once or twice into the cham-

her pot. I was afraid of his going towards the bed where the pistols were, and followed him, and, laying hold of the pistols, put them into my pocket; upon which the Major darted his hands into my pocket, and took back the pistols, saying, he could bear any thing but that. I then asked permission to unload the pistols, which he refused. The Major then sat down on the foot of the bed, when I desired him to remember, that the first and leading instinct of nature was self preservation; and not to take away what he could not put there, or otherwise, he was taking away the prerogative of the Almighty; he said, he knew that. I afterwards suggested, that he had better go down to Gilmerton, and not give Mr Walker's people trouble; upon which he started up, and said, "What, William, do you think I'm a trouble." I checked myself and said, "I did not mean that Sir, but only that you " would be better off at Gilmerton, where you would get a " good room to yourself, and a servant to attend you." The Major said, "I believe you're right William," and agreed to go; but in a moment, throwing himself back in his chair, said, "I cannot go." I said, if he was not well, I would go down and get the coach for him, or at any rate, I would get the coachman, and help him down. But the Major still repeated, that he could not go. He then asked me Who were at Gilmerton, and I acquainted him, mentioning, among others, a Mr Low from the Merse. Upon this I offered to go away; but the Major said to me, in the most earnest manner, "You must not " leave me to-night William." I however pleaded a great deal of business, which led to some conversation about what was going on in the garden. About this time, the Major suddenly asked, if Mr Low was down stairs, and insisted that I had told him so, to which I answered, I meant Mr Low was down at Gilmerton. With some difficulty I at length obtained leave to go away, upon promise of returning; and, after getting out of the room, made the best of my way down stairs. On coming down, I met Mr Walker, who took me into a private room, and I said that I was under the necessity of going home; and Mrs Walker

Walker coming in, said, it was very right not to detain me, and that Mr Somner should be sent for. I then got out of the house; but upon passing by the window of the room where the Major was, I heard a violent rapping on the window and, looking behind, observed the Major; on which I ran home as fast as I could, and, after telling my wife a little of what passed, but not to be uneasy, I went forward to the house of Gilmerton. Did you inform any person there as to the Major's situation? Yes. I called out Mr M'Millan to the lobby; but before I had time to speak to him, Sir Francis himself came out; and I told them what had passed, and added, that I would on no account see the Major, as I was afraid I had offended him by not going back when he rapped for me. Did any conversation pass respecting the bit of paper which you had received from the Major at Beanston? On the road from Beanston I looked at it, and found it to be an English bill or bank note for L.30. I accordingly shewed it to Sir Francis and Mr M'Millan in the lobby, and gave it to Sir Francis, who returned it to me; and I next day gave it to Mr Hay Smith messenger, to be delivered to Mr Frazer.

Did you again see the Major in the course of the Tuesday evening? Yes, while I was in the lobby with Sir Francis and Mr M'Millan, I observed the Major pretty nigh coming under the trees towards the house; upon which, after repeating that I would by no means meet with him, I went through the lobby towards the servants hall, where I found the brewer, and told him, for God's sake, to go to the lobby and make himself useful, if he was wanted. Did you afterwards see the Major that evening? Yes, sometime after, Sir Francis came and told me that the Major was in his room, and requested, as he seemed to have a good opinion of me, that I might go up and endeavour to get the pistols from him, and persuade him to go to bed. Though I was under considerable apprehension, I consented to go at Sir Francis's request; and accordingly went into

into the room, resolving at once to put myself upon the Major's mercy. The Major, however, received me kindly, and shook me by the hand, saying he was glad to see me. *Mr Hume.*—Mention all that passed.

In a little, the Major went to the head of the stair, and to the door of the room where the young Cunlisses were, under the care of my daughter, who had bolted the door. The Major said he must be in to see the children, of whom I knew him to be very fond, on which I called to my daughter, that she need not be afraid, but might open the door, which she accordingly did, and the Major went up to the bed, and clapped Master Cunliffe on the cheek; but, on my begging him not to wake the child, he came away, and said he would go to his bed. He accordingly returned to his room, and I went down stairs, and into the butler's parlour at the foot of the stone stair. Did you then leave the house? No. Being suspicious of what might happen, I watched every foot I could hear in the stair, and soon heard the Major come down; on which I followed him into the lobby, and Sir Francis, who was there with some of the gentlemen, pointed to me not to let him out. I accordingly ran up, and got the Major under one arm, while Sir Francis took him by the other. The Major, however, got a little way on the gravel before the door, when he just turned about, and looked up staring wildly at the front of the house. The Major then returned to the house, and, when the gentlemen quitted him, passed through the lobby, and tried to open the back door; but, on finding it locked, he went up the wooden stair. I followed him, and saw him try to open several doors; but, on finding them locked, Asked what was the meaning of all that? and the butler made some excuse, that they had been washing the rooms. The Major then returned to his room, and some time after said, he would go to bed; on which I wished him good night, and he said, "Good night William, and a heavenly morning." Did you immediately go down stairs? I staid in a small room at the head of the stair, and soon heard



heard the Major leave his room, and stepped forward to meet him, and prevent him from going down; on which the Major seemed displeased, and said, "What is the meaning, William, of all this interest you are taking about me to night?" I answered, "I thought you had been in bed Sir, and am afraid you will catch cold going about in that manner," He had many of his cloaths off. He then told me to go home to my family, and not mind him; and after this he went back to his room, and I went down to the butler's parlour. Were you not soon afterwards sent for by the Major? Yes, on my going up he desired me to shut the door, which I only pulled to, without snecking it. The Major next desired me to lift in a table that was standing at the end of the room farthest from the door, which I was affraid to do, as he would thus be between me and the door; but, upon his again desiring me to lift in the table, I did so.—The Major immediately laid down upon the table a book which he had in his hand, and which I believed to be the bible; and he repeated some lines of poetry, which I do not recollect. After some conversation, the Major observed, that the door was not shut; upon which he seemed to be angry, saying, "How could you deceive me, William, by making me believe that the door was shut when it was not?" I excused myself by saying, I thought it had been shut; upon which the Major repeated the order, and I was obliged to shut it. When the Major saw the door was shut, he went towards the east window, and one of the shutters being shut, he flung it open, and then put several questions to me. Among others, he asked me, How many children I had? and I having answered that I had five, the Major replied, "And your wife makes six." The Major then drew his chair close to me, and looking me broad in the face, said, "William, have you told the people here what passed at Beantston." I being afraid, answered that I had not. The Major said, "I did not expect such a thing of you, William;" on which, I again assured him, that I had not. Some-  
time

time after, he wished me good night, and I saw him no more.

Did you suppose the Major to be the worse of liquor on the Tuesday evening? No. When I first saw Sir Francis and Mr M'Millan in the lobby that evening, I told them, that I neither perceived nor suspected the Major being the worse of liquor.

*Dr. JAME HOME, Physician in Edinburgh, examined by*  
Mr MONNYPENNY.

Did Major Gordon appear to be much affected by his father's death? Major Gordon appeared much affected by his father's death. He had paid him the greatest attention during his last illness. Do you recollect seeing the Major in Edinburgh, about the beginning of March last; and what state did he appear to be in? On the last day of March, or first day of April, I met Dr Farquharson in the Exchange; amongst other conversation, he asked me if I had seen my friend Gordon? I asked him what Gordon? He said Major Gordon Kinloch. I told him that I had not seen him. He then said, he had met with him to-day; and that, from his appearance and conversation, he thought him in a very *queer* state, and that he would not be at all surprised, if the Major destroyed himself. I told Dr. Farquharson, that his appearance, at times, had long impressed me with such an idea. Next day, (the first or second of April,) hearing that Major Gordon lodged at Robertson's, Black-Bull, head of Leith-Walk, I called upon him about four o'clock. He started when I first came into the room. I saw that he was in very low spirits.—I asked him to dine at Hunter's, Writers-Court, along with his brother Mr Alexander Kinloch. He readily agreed. When in the street, he appeared to me to be very nervous or irritable; the passing of a carriage along the street, seemed to agitate him. At dinner, he tried to eat several things, but found that he could not. The waiter endeavoured to sollicit his appetite, by presenting him with every thing that was nice in the house; but it was in  
vain

vain, he did not eat an ounce of any thing. In particular, I recollect, the waiter proposed to devil something for him, when the Major replied, " All the devils in hell wont appease my stomach." He could not drink port, and seemed to dislike every kind of drink ; at last, I prevailed upon him to get a little brandy, which he drank, mixed with a large quantity of water. We parted at half-past seven o'clock, and, in that time, he drank one gill of brandy, or two at the utmost. His appearance that day struck me very much, and I resolved upon taking the first opportunity of informing Sir Francis of his situation.

Did you accordingly speak to Sir Francis on the subject? I saw Sir Francis Kinloch in the evening of the next day, after having seen Major Gordon. I told him my opinion of his brother, which was, that I thought him in such a state of mind, that he would probably attempt to destroy himself, and advised him to look after him. Sir Francis said, that of late years his brother had become so peculiar in his temper, that he did not chuse to meddle with him ; that he had frequently observed such melancholy fits ; that generally after these, he became very restless ; and that he would then disappear from Gilmerton for a long time ; that nobody knew where he went to ; and that he returned perfectly well. About this time, when I was advising Sir Francis Kinloch to leave the town and go to Gilmerton, as the best way of getting free of a cold which he then had, he told me, as a reason for his not going to his own house, that his brother the Major was then in a very unsettled state, and that he wished him to go away from Gilmerton, which he always did when in that restless disposition, and that then he (Sir Francis Kinloch) would leave the town. Did Sir Francis, before this period, ever mention to you his brother's occasional derangement, and assign any cause for it? Sir Francis has frequently mentioned to me his brother's disordered state of mind as a matter of great concern to himself, and to the whole family. He attributed it to a fever which he had when

when in the West-Indies; as previous to his going to the West-Indies, he was a very good tempered man. Did you again see the Major in Edinburgh in April last; and in what state did you find him? On the 9th of April, I saw Major Gordon in his brother Mr Alexander Kinloch's room, at Dumbreck's, about three o'clock, Mr Waite, and Mr James Home Writer to the signet, were in the room along with him. He appeared to be very melancholy and spoke little. Mr Waite went away soon after I came in. In a little time Major Gordon went away. I took that opportunity of going with him. I asked him to take a walk before dinner. My reason for this was, that I wished to have some conversation with him upon his health; but he declined taking a walk, as he said he had a head-ach, and was busy preparing for his journey to London, as he intended to set out next day. We parted at the door of Dumbreck's other hotel. He did not even ask me to come in with him to his lodgings. Were you called to Gilmerton, after the accident which befel Sir Francis? In what situation did you find him? and had you any conversation with him, particularly respecting the accident? On the 16th of April, in consequence of a letter from Mr M'Millan at Gilmerton, mentioning, that it was Sir Francis's wish that we should come out and see him, Dr F. Home and I went out to Gilmerton, and got there by half past nine o'clock in the morning. We found him in such a situation that he could not live many hours. He gradually sunk, and died about half-past eleven o'clock that evening. He remained perfectly sensible until within an hour of his death. I seldom left him for above ten minutes at a time. He talked very little, and only once about the accident which had happened to him. It was about two or three o'clock, *Sir Francis* asked me, "What have they done with my poor (or unhappy) brother." I answered, "He was carried to Haddington Jail last night." *Sir Francis* replied, "It would have been much better to have sent him to a private madhouse about Edinburgh." "But you know, (said I,) "that this unhappy  
" accident



"accident must now become a matter of legal investigation, and he is committed to Haddington Jail by orders of the Sheriff." Sir Francis then observed, "They had much better let it drop, for he was mad."—As Sir Francis had begun the subject, I thought it a proper opportunity of ascertaining a circumstance about which I could get no information from any person in the family, namely, whether Sir Francis had laid hold of Major Gordon before the pistol was fired." I accordingly asked him, "Did you actually seize upon Gordon, before he fired the pistol?" "Sir Francis answered "Yes." "Good God, Sir Francis (said I) how could you be so foolish as to attempt to lay hold of a man in a state of such furious insanity, and with arms about him?" Sir Francis replied, "There would have been no danger, if the servants had done their duty." This conversation made such an impression upon me, that I instantly retired to a corner of the room, took a card out of my pocket, and wrote it down. Have you preserved that card? Yes, I have it in my pocket.

When did you first see Major Gordon after the accident, and in what state did you find him? I saw Major Gordon on Friday the 17th of April in Haddington Jail, in company with Mr Goldie and Mr George Somner. My reason for going to see him was to afford him every assistance which I could, as I understood that, since he had left Gilmerton, no medical person had seen him. I found him confined in a strait jacket; but walking about the room. His countenance looked wild and furious: His eyes were red and inflamed: He was very much agitated; spoke of the horrid accident which had happened, in terms of the greatest regret: He complained of much confusion and noise in his head; he was correct enough when his attention was fixed to any subject; but it was impossible to do this for above a minute at a time, his ideas quickly wandering to other things; and he asked the same questions more than once. I did not stay with him above a quarter of an hour. But his looks and conversation, at this time, appeared to me

to be those of a person just recovering from a fit of mania.

Had you occasion to see the Major in Edinburgh Jail, and to remark any thing particular in his appearance, or behaviour, while there? After Major Gordon was brought to Edinburgh Jail, I saw him frequently, at least once a day. He was at times very melancholy. At other times, his appearance was like that of a maniac; particularly, on Sunday the 26th of April. I went to see him that forenoon, in company with Major John Mackay; as, from the wild appearance of Major Gordon the preceding day, Major Mackay wished to have some person along with him. Immediately when I saw him, I perceived a difference in his appearance from that of the day before.—His countenance was wild, his eyes glaring, and like those of a mad person: and his walk was hurried. He, however, behaved very composedly to us for a few minutes: but, when Major Mackay wished him to repeat before me, some circumstances of a private nature, which he had mentioned the day before, Major Gordon could not recollect that he had told Major Mackay any such things as he alledged; and, when Major Mackay repeated the conversation he alluded to, he said that the Major had no right to enquire into his private affairs, and that the Major betrayed a confidential discourse. He became much agitated; he looked very wild; and he put himself into such violent and threatening postures, that both Major Mackay and I were very much alarmed.—His appearance and behaviour, seemed to me to be the more singular, as at that time he was confined to a very low diet. Upon this occasion, I remarked to Major Mackay, that, if the same state continued, it would be necessary to put Major Gordon in a strait-jacket.—On the third of May I went to England; and therefore did not see him for five weeks.

Had you ever any conversation with the late Sir David Kinloch respecting Major Gordon, from which you could understand that Sir David considered the Major as occasionally deranged? I have had frequent conversations with the late Sir David Kinloch, respecting Major Gordon, and have

have sometimes heard Sir David mention several oddities in the Major's behaviour ; and Sir David has often said to me, " Poor, unhappy man ! he is much deranged."

*Mr Hope.* My Lord, I propose now to call Dr Farquharson ; and I have the pleasure to add that he will be the last witness. We have, indeed, many more in waiting ; but, on consulting with my brethren, I think it unnecessary to give the Jury further trouble, both because it is impossible to add strength to the evidence already brought, and, because, judging by myself, the Court and Jury must be very much exhausted. With this gentleman, therefore, we shall close our proof.

Dr WILLIAM FARQUHARSON, *Member of the Royal College of Surgeons in Edinburgh* examined by Mr RAE.—How long have you been acquainted with the pannel Major Gordon Kinloch ? Six years. On what occasion did you become acquainted ? I was called to him in September 1789, in Mrs Warden's Grass-market, where I found him sitting in a small bed room, with one of his wrists wrapped up in a handkerchief, which was very bloody. He was in such a state of agitation, and mental derangement, that he could hardly give any account of his wound ; though he hinted, that he had hurt himself by pushing his hand through the window of a carriage. This appeared impossible from the nature of the wound ; and the gentleman, who had called me to see him, told me, that the postilion suspected the Major had wounded himself while in the carriage ; and in this opinion we were confirmed, by searching his pockets after he was put to bed, and finding a small knife, the blade of which was bloody ; and still more, by his evading any enquiry on the subject, though he never denied it. Do you think, that his derangement was occasioned by the wound ? No. I found him so much agitated,—and his looks were so furious, that I concluded his disorder proceeded from actual derangement, more especially, as the coolness of his skin, and the calmness of

of his pulse, did not indicate a sufficient degree of fever, to account for the symptoms.

How long did he remain in Wardens? Several days. I got him removed to a house at the head of the Cowgate, occupied by a Mrs Cameron, who kept boarders.—How long did you attend him? About two months. Was he deranged all that time? For the first month, he was very unsettled, being at times more rational, and at other times quite sulky and deranged, though in a gradual state of convalescence; and it was about two months before I thought it safe for him to leave town.

Did you ever see in the pannel any other symptoms of derangement? Yes. About the first of April last, I met the Major coming along the North Bridge very fast, but sometimes stopping, and looking down. He was passing me; I stopped him, and had some conversation in which he appeared very incoherent. After parting, he turned, and called on me. On my coming back he looked several minutes over the parapet of the North Bridge, towards the castle, and, appearing still more agitated than before, suddenly exclaimed, “ Good God will that man,” (alluding to a gentleman whom he named) “ do nothing for himself:” On my expressing ignorance of his meaning, he said “ Will he not go out of the world like a Gentleman? I have advised him to it, as the only thing left for him to do; but I am afraid he has not spirit.” From this, and the whole of his appearance and conversation, I was afraid that the Major would do some mischief to himself. This fear I expressed to Dr James Home; and I afterwards understood, that he mentioned it to some of the Major’s family.

When did you see the Major next? In Haddington jail. What state was he in? He was in irons, and did not seem to understand his situation properly; for, instead of touching upon the accident, which occasioned his being there, he began immediately to complain of the irons hurting his feet, which were gouty.

Have you seen him since he came last to Edinburgh? I have visited him almost every day since he was in Edinburgh jail. How have you found him? I have found him frequently



frequently much agitated. I never could get him to rest upon one subject for many minutes at a time, excepting the melancholy accident; but even from this he would sometimes proceed abruptly to the most trifling, and totally unconnected subject; and, on one occasion, in the course of a conversation about the accident, happening to observe an uniform button on my coat, he seized it like a child, and asked if he could not have a set like it. On the Saturday after his being brought to Edinburgh, I found him very sulky, going about the room in great wrath, and complaining of Major Mackay's having used him ill, in desiring him to apply for counsel and an agent to make his defence. He said this was a thing which nobody had any thing to do with, and he would make no defence; and it appeared very clearly to me, that at this time he did not know what was meant by a defence. Sometime afterwards, on being informed that Mr Hope and Mr Bremner had been employed, he asked upon what authority, was very sulky, and said he did not understand how any person should be employed for him without his own consent.

Did you ever hear the pannel regret, that he was not prevented from committing the unlucky deed? He has frequently, in my hearing, expressed his regret and astonishment, that he was not prevented.

Were you requested to use your influence with the pannel, to prevail with him, to give such information as might aid his defence? I was, but could not make him understand the necessity of giving any information, and accordingly, none was obtained from him.

Did he usually make rational answers to any questions you put to him? I have often found great difficulty in getting any answers at all; and, when I did, they were generally from the purpose.

Dr. FARQUHARSON, *cross examined by the Lord Advocate.*  
When you attended the pannel at Warden's, had you occasion to know that he had swallowed a large quantity of laudanum? On searching his pockets, a large phial of laudanum was found, not quite full; but whether he had swallowed

swallowed the whole of what the phial had contained, I cannot say,—though, from the smell, I believed that he had taken some of it,—perhaps a good deal more than an ordinary dose. I could, however, obtain no information on the subject from himself; either during the period of his convalescence, or since. Did you ever caution him against the use of laudanum? No. Did you find him tractable? In general I did, though sometimes I was obliged to use strong expressions; but he did every thing he was desired, except to take the quantity of bark and wine, which I thought necessary for healing his arm.

Had you any conversation about naming his counsel? While I was with the pannel in Haddington Jail, Mr Fraser's clerk came in with a line, which (in consequence of previous information from Mr Fraser) I understood to be a recommendation to appoint counsel and an agent. On this, I left him and the clerk together; but, in a short time, I was again sent for by the Major, who shewed me Mr Fraser's letter, and asked my opinion of it.—I approved of Mr Fraser's suggestion; and, on the Major's hesitating as to whom he should name, from his not being particularly acquainted with any counsel, I proposed to get an almanack and examine the list of the Faculty. We accordingly procured an almanack; and, in the course of reading over the list, the Major named the Dean of Faculty, and Mr George Fergusson. I afterwards understood, that he wrote to both these gentlemen, though I am certain, that he recollects nothing about his having applied to Mr Fergusson, and recollects the application to the Dean, only in consequence of his having received an answer to it.—He asked me what was the meaning of an agent. This I endeavoured to explain, but found it impossible to make him understand the necessity of employing one.

The Exculpatory Proof being closed, the *Lord Advocate* rose, and addressed the Jury in support of the prosecution. His Lordship commenced his speech at about half-past four o'clock on Tuesday morning.

## LORD ADVOCATE'S SPEECH.

*Gentlemen of the Jury,*

THE duty which you are summoned to discharge as a special jury, is of the most important nature. I should be stating what is not true, and what it would be very improper for me not to mention to you, that an alteration has taken place in the close of the evidence, which considerably changes the appearance it had at its commencement.

The present case is not one which in its nature is attended with any considerable degree of difficulty ; or where the rules of determination are not plain and obvious : But I should be departing from that which I have always done, and which I shall always continue to do, in every criminal trial, were I to conceal from you what I really feel, that the evidence in favour of the unhappy person at the bar, has ultimately come out stronger than I was aware of, or expected when I came into this Court.

The Counsel who early in this trial opened the defence with that elegance and propriety for which he is so remarkably distinguished, was pleased to state that this was *a most necessary prosecution*. He stated no more than is true, and what you must all feel to be so ; for ill indeed would the criminal justice of this country be attended to, and much would those, whose business it is to prosecute offences, be wanting in their duty, if the life of a fellow-citizen were to be taken without enquiry, and his blood permitted to flow, without a Jury determining on the guilt or innocence of the person accused of having done so.

My brother, Mr Hope, in the course of a debate which arose betwixt us, in relation to the admissibility of certain notes proposed to be given in evidence on the part of Miss Kinloch, was pleased to state, that, if he stood on the opposite side of the bar, he would not, as I did, have opposed the reading of the notes ; and added, that he would rather have abandoned the prosecution. Gentlemen of the Jury, I am of a different opinion. I should have violated every rule and principle of justice, if I had dared to dis-

criminate between the case of this gentleman, and that of the poorest criminal who ever stood at the bar, or have suffered my feelings for his wretched and unhappy sister, to lead me from the strict line of my duty. Though the pannel has not, through my persisting in the objection, been deprived of the benefit of his sister's evidence, whatever force it may have had on your minds, and however much I might have regreted had her distress incapacitated her from giving her testimony in Court, yet, far from abandoning the prosecution on that account, I would without hesitation have called upon you to have given a verdict according to your consciences from the evidence before you ; nor would I, though I might have lamented the circumstance which occasioned her absence, have consented to an exception in her favour over other witnesses, or have thought that, by resisting the demand made for her of referring to notes, the smallest degree of blame could justly be imputed to me.

Having stated these preliminary observations, I come next to the matter of fact. The Counsel for the pannel is pleased to say, that the killing is admitted. I could not accept the admission : It is proved. And I should offer an insult to your understandings, were I to utter a single word on the complete sufficiency of that part of the evidence.

To the evidence then we come, of what truly is the cause before you : Is the defence of insanity proved to that extent, and degree, which law and reason require, in exculpation of the crime of murder ?

The Law of Scotland is, and must in this respect be the same with the Law of England, because both are founded in the plainest and most obvious principles of justice. It is such as entitles the person who kills his fellow-creature to the full benefit of the defence of insanity, if he can prove it on a fair trial ; but I do say, under correction of the Court, that it is only he who is absolutely insane, who is perfectly mad or furious, that is free from trial, and consequently free from punishment.

He that is subject to temporary fits of complete and perfect madness, cannot in like manner be punished for the actions



he commits in the midst of his delirium; but, for those committed in his lucid intervals, he is, with exceptions unnecessary for you to attend to at present, as competent to trial and punishment, as any other man.

But there is a third description of persons, and to this I request your particular attention, for it is the description under which the present case falls; I mean that degree of derangement which has been attributed to the pannel; that degree of melancholy and depression of spirits, which, tho' it may border on insanity, is nevertheless accompanied with a sufficient share of judgment to discern good from evil, and moral right from wrong; which never has, and never can be sustained as a bar to trial, or a defence against punishment for a crime so atrocious as murder; but subjects such persons to conviction and punishment, as much as if no symptoms of derangement had ever appeared, or as if complete evidence had been laid before you, that he was in a lucid interval, and in the full possession of his senses when the action was committed.

It is unnecessary for me, especially at this hour of the morning, to multiply authorities, in support of what must appear on the very statement of it, consistent with law and with reason. I could refer to several; but shall confine myself to two short quotations from two eminent authors, one of this, and the other of our sister kingdom; I mean Sir George M'Kenzie in this country, and Lord Chief Justice Hale in England; not only because they are known to be writers of the highest authority in each country, but because they state the law and the reasons of it with so much perspicuity, that no man can be at a loss to understand it; and he has only to enquire how far the evidence is or is not sufficient to establish the legal defence in the particular case under consideration. Sir George M'Kenzie observes, "Such as are furious are not in the construction of law capable to commit a crime, Stat. 2. Rob. II. for the law compares them to infants, or to dead men, *L. Si quis, F. de acquirend. hered.* to such as are absent, *L. sed si F. de injuriis*, and makes them to be no more guilty, because of the crime they commit, than a stone from a house, or a beast, is to be reputed guilty, and punishable for the wrong they do.

*Quam*

' *Quam si pauperiem pecus dederit, aut tegula ceciderit, L. 5.*  
 ' *F. ad L. Aquil.* And the law commiserates so far their  
 ' condition, that it expostulates with such as would pursue  
 ' them for a crime, *et non enigas penas ab eo, quem fati infer-*  
 ' *licitas excusat, quiq; furore ipso satis punitur, L. infans F.*  
 ' *ad L. Corn. de fcar.* They are excused by their own  
 ' misfortune, and abundantly punished by their own fury;  
 ' but since the law protects furious persons from punish-  
 ' ment, because they want all judgment, *L. 14. F. de offi-*  
 ' *cio prasid.* it follows naturally, that this privilege should  
 ' be only extended to such as are absolutely furious."

He then proceeds in the subsequent section, which I am  
 about to read, to consider the case of persons who are only  
 mad to a certain degree; and states, as a question of doubt,  
 the old doctrine argued by some writers on the civil law,  
 but long ago justly exploded, that though they are not free  
 from punishment altogether, yet that, by the rule of pro-  
 portion, their punishment ought to be mitigated. " 2. It  
 ' may be argued, that since the law grants a total impunity  
 ' to such as are *absolutely furious*, that therefore it should,  
 ' by the rule of proportion, lessen and moderate the punish-  
 ' ments of such, as though they are not absolutely mad, yet  
 ' are hypochondriack and melancholy to such a degree that  
 ' it clouds their reason, *qui sensum aliquem habent, sed dimi-*  
 ' *nutum*, which lawyers call *insania*, and the Greek *μωροσυγία*.  
 ' 3. That such as shew any act of resentment or revenge in the  
 ' wrong they do, may be punished with some degree of seve-  
 ' rity, since they shew some degree of judgment. But yet the  
 ' *Parliament of Paris* is justly condemned by all lawyers, for  
 ' having caused execute a madman who had killed one that  
 ' had struck him two days before; but, since he did shew  
 ' memory and revenge in that act, he might have been pu-  
 ' nished justly to some moderate degree."

From the stile of this passage, and manner of expres-  
 sion, you, Gentlemen, will readily observe, that the case  
 which Sir George M'Kenzie here states as dubious, not  
 whether it is exempt from punishment altogether, but  
 whether the ordinary or a less severe one is to be inflicted,  
 is the very case of the pannel at the bar; and since for that  
 question there is now no room, as the prisoner either is  
 liable

liable to a capital, or to no punishment at all; you are bound, according to the evidence before you, either to find him not guilty, if you believe that he was, at the moment he took his brother's life, absolutely furious or insane; or, if you think he knew the nature of his crime, to return a verdict of guilty against him.

The only other author I shall refer to, is Chief Justice Hale. He says, P. I. c. 4. § 2. "*Dementia accidentalis, vel adventitia*, which proceeds from several causes, sometimes from the distempers of the humours of the body, as deep melancholy, or adust choler; sometimes from the violence of a disease, as a fever or palsy; sometimes from a concussion or hurt of the brain, or its membranes or organs; and as it comes from several causes, so it is of several kinds or degrees; which, as to the purpose in hand, may be thus distributed: 1<sup>st</sup>, There is a partial insanity of mind; and 2<sup>d</sup>, A total insanity.

"The former is either in respect to things, *quoad hoc vel illud insanire*; some persons that have a competent use of reason, in respect of some subjects, are yet under a particular *dementia* in respect of some particular discourses, subjects or applications; or else it is partial in respect of degrees; and this is the condition of very many, especially melancholy persons, who, for the most part, discover their defect in excessive fears and griefs, and yet are not wholly destitute of the use of reason; and this partial insanity seems not to excuse them in the committing of any offence for its matter capital; for, doubtless, most persons that are felons of themselves, and others, are under a degree of partial insanity when they commit these offences: it is very difficult to define the indivisible line that divides perfect and partial insanity; but it must rest upon circumstances duly to be weighed and considered, both by the Judge and Jury, lest, on the one side, there be a kind of inhumanity towards the defects of human nature; or, on the other side, too great an indulgence given to great crimes: the best manner that I can think of, is this; such a person as, labouring under melancholy distempers, hath yet, ordinarily, as great understanding, as ordinarily a child of fourteen years hath, is such a person as may be guilty of treason or felony."

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In another passage, this author proceeds to state: "Now, touching the trial of this incapacity, and who shall be adjudged in such a degree thereof, to excuse from the guilt of capital offences; this is a matter of great difficulty, partly from the easiness of counterfeiting this disability, when it is to excuse a nocent, and partly from the variety of degrees of this infirmity, whereof some are sufficient, and some are insufficient to excuse persons in capital offences.

"Yet the law of England hath afforded the best method of trial, that is possible, of this, and all other matters of fact, namely, by a jury of twelve men, all concurring in the same judgment, by the testimony of witnesses *viva voce*, in the presence of the Judge and Jury, and by the inspection and direction of the Judge."

This then is the material, and indeed the only question you have to try, whether the person at the bar is of that description, and whether the evidence adduced is sufficient to warrant the conclusion, that he was deranged to such a degree, as to excuse him from the capital punishment due to a heinous murder. It is my duty to submit to you such observations, as appear necessary for aiding you in this enquiry: And I must begin by presuming to point out to you those parts of the evidence which do not bear upon the defence, and to which, in my opinion, you ought not to attend: I mean the evidence of the gentlemen near me, who, much to their honour, seem, at much personal inconvenience, to have come from a considerable distance, from the service of their King and Country, to discharge the best and most benevolent of all duties, that of giving their testimony in favour of their unfortunate fellow-foldier and friend. Permit me, however, to tell you, Gentlemen, that you must dismiss their evidence totally out of the question. Colonel Twentyman and Captain Miller have both proved, that, before 1779, the pannel was beloved by all, possessed many excellent qualities, was polite, humane and generous; but that a fever in the West Indies totally changed his disposition, and deranged his understanding: The derangement I admit. But it is the degree of derangement that you are to consider; and, unless you are prepared to go this length, and to say that from the 1779 downwards, to the night of this melancholy event, he was occasionally, and at the time



of its happening, so completely deranged as to fall under the description of perfect and total insanity, you cannot possibly exculpate him : But the evidence of his family, and those most intimate in it, completely contradicts such a supposition : For, however whimsically and absurdly he may from time to time have conducted himself, we have not heard of any thing being done by them, or even proposed to be done regarding him, which can induce you to believe that they really thought him insane. He left his father's house from time to time, without previous notice, or mentioning whither he was going : You find him returning again as unexpectedly, and, in a variety of other particulars, acting with a great degree of absurdity, but which neither did in fact, nor was considered by any of his family, as amounting to madness. He made two visits to Colonel Twentyman at Lincoln, where he behaved absurdly enough, it is true ; but he returned to his own family, and to the management of his own affairs, without any steps being even proposed to be taken, or being judged necessary for the purpose of confining him. The story told by Major Mackay, of his having, some years ago, at Northberwick, taken a sudden and idle whim into his head, that the Major had made him the butt of the company, is just of the same description, and seems to have passed just as much unnoticed by all the family. But it will be recollected, and it seems material, that, on a question explicitly put to Mr M'Millan, whether the pannel was able to distinguish good from evil, he answered in the affirmative ; an opinion confirmed by the fact, that though the pannel had been liable to fits of temporary insanity, still that was but partial ; as it cannot be supposed that his family, when they saw the fit approaching, would not otherwise have taken measures to secure him, and prevent him from injuring himself or others ; which, with the exception of the circumstance deposed to by Dr Farquharson, on which I shall have occasion to remark hereafter, no person concerned with him seems ever to have thought necessary.

Miss Kinloch and Mr Frazer have also told us of other circumstances in the pannel's conduct, but all of them of a similar nature ; of her father, on a journey to Wooler, having observed that Gordon's malady was returning ; and that, on another occasion, he had taken into his head a notion

tion that he had signed a renunciation of his right of inheritance to the estate of Gilmerton.

But, upon reviewing all these circumstances, there is one thing which always occurs, and which must strike you forcibly, that you find him living in his father's house, without any steps being taken that make it appear his family looked upon him to be insane. You find him, during his father's life, frequently leaving Gilmerton in a hurry, without telling where he was going; but who is there that will venture to assert this sort of capricious conduct to be in any means a proof of insanity? It is needless for me to go over this part of the evidence, so I shall not repeat one word of it; but I shall only say, that, though it may prove a sort of derangement, it does not amount to that degree of it, which, on the authority of Lord Hale, and in sound law and reason, can alone render him unaccountable for his actions.

As to his jumping out of the chaise, and leaving the company on the road to Gilmerton, it is your business to consider how far that is a mark of derangement. You will observe, that he returned a rational answer to the postilion who was sent after him, viz. "He was going to Haddington, and he would be found there."

You find him, from the evidence of Dr Farquharson, attempting, some years ago, his own life; but I am much afraid, that you will not look upon an attempt to commit suicide, as a proof of insanity. We have heard of this being done by those who never were either suspected, or accused of insanity, and who, to the last fatal act, were cool, collected, and in the full exercise of their faculties. It is impossible for me, however, not to admit, that the evidence of Dr Farquharson does go directly to establish, at this period, a fit of strong, decided insanity; and it is for you to consider and determine what weight that circumstance can have on the present trial, and whether that solitary instance is sufficient, in your opinion, to fix upon him the character of madness, in the face of, and when contrasted with all the other evidence, to which I have already alluded, and which still remains to be considered.

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We had, if I recollect right, one or two other instances of excentrick behaviour in the pannel as far back as the year 1786. Still, however, they were but instances of extreme absurdity ; and still, in my humble opinion, does the compleat neglect paid by his family to these appearances, preclude any supposition of insanity.

There was a story that Frazer told you about a bill, which the pannel had remitted him in payment of a debt, on which, after satisfying the debt, a balance remained due, and had been paid to the pannel ; but which, at the distance of three or four years, the pannel conceived had not been returned to him ; but, when the matter was explained, he instantly acknowledged his mistake, and seemed hurt and vexed at the explanation he had demanded. This at the utmost infers only a defect of memory . But, could it admit of being carried further, the answer still is the same, that the degree of derangement was not such as to induce his friends even to propose the putting him in confinement.

But the circumstance which I consider of the most importance, and of such moment, that I must state it to you as of the utmost consequence, is, that, immediately after he had committed the action, he seems to have had perfect knowledge of what he had done, and was perfectly aware of the consequences of it. The servants have all concurred in deponing, that, when thrown on the carpet, he said he would give them L. 100 to let him go ; and soon afterwards exclaimed that he had done an awful thing. When visited next morning by Mr Goldie, he enters with him into a discussion of what happened ; he endeavours to vindicate himself upon the plea of self-defence, by telling Mr Goldie that there was a deliberate plan laid to destroy him.

From the testimony of Frazer, it appears, that he was all along capable of transacting business. You have it both from Smith and Dodds, the first of whom carried him on Wednesday evening to Haddington jail, and a few days thereafter accompanied him to Edinburgh, and the last of whom saw him frequently in Haddington, and carried messages to and from Mr Frazer, that he was always collected and rational ; at no time do I find him awakening as it

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were

were from a dream, to the recollection of what had passed during his delirium, and of which he was ignorant while totally deprived of reason. In the testimonies of Dr Monro and Mr Bell, you have complete evidence that, during their attendance, they saw no symptoms of madness about him. In short, if I can discover no moment of time at which total insanity commenced, I can see no period when returning reason resumes her reign: That he has method in his derangement, and that he does not converse like a madman, is evident; he has complete recollection as to circumstances that happen some time before; and though he may reason absurdly, still he does reason, and understands the consequences of what he has done, and the cause of his confinement.

Gentlemen, the question you are to determine comes to this short and simple issue: If it appears that the pannel was in a situation of knowing good from evil, you cannot acquit him. If you do not think that he was perfectly and truly ignorant of what he was doing; if you shall believe that he knew murder to be a crime, you must be of opinion that he is answerable for his actions, and consequently liable to punishment.

It remains for me only to offer a few remarks on the only two instances which appear to me to be proved of any thing resembling that insanity, which can afford a relevant defence against the crime of murder; the one deponed to by Dr Farquharson, the other by Walker and Reid. That they are entitled to weight, and to your serious consideration, it would be as unjust as unavailing for me to deny. To your own consideration I chiefly leave them: But calling upon you particularly to consider, and to judge, whether they proceeded from drunkenness, or any other cause imputable to the pannel himself, or were really the consequences of unavoidable insanity.

That this is an essential and material distinction, into which you must accurately enquire, cannot need the aid of argument or authority. Lord Hale tells us, "The third sort of *dementia*, is that which is *dementia affectata*, namely, *drunkenness*. This vice doth deprive men



of the use of reason, and puts many men into a perfect, but temporary phrenzy : And therefore, according to some civilians, such a person, committing *homicide*, shall not be punished simply for the crime of homicide, but shall suffer for his drunkenness, answerable to the nature of the crime occasioned thereby ; so that yet the formal cause of his punishment is rather the drunkenness, than the crime committed in it : But, by the laws of England, such a person shall have no privilege by this voluntary contracted madness, but shall have the same judgment as if he were in his right senses."

He then states two exceptions ; the first, " If a person, by the unskilfulness of his physician, or by the contrivance of his enemies, eat or drink such a thing as causeth such a temporary or permanent phrenzy, as *aconitum*, or *nux vomica*, this puts him into the same condition, in reference to crimes, as any other phrenzy, and equally excuseth him." And the second is, where an habitual and fixed phrenzy is occasioned by the fault of the insane person, in which also the defence of insanity is good. But from both, it is clear, that a temporary and partial insanity, occasioned by the act and deed of the party accused, is not of that nature as to free him from trial and punishment, for offences committed during the subsistence of such criminal delirium.

It is your business, Gentlemen of the Jury, to enquire and decide, whether these two instances are not to be ascribed to the pannel himself, and to the influence of laudanum. It is clear from Dr Farquharson's evidence, that the first of the two was imputable to a dose of laudanum voluntarily taken by the pannel : And the evidence of Miss Kinloch, joined to the testimony of Reid, who saw him on the Tuesday evening, with a phial, in which a small quantity of high coloured liquid remained, afford convincing evidence that his deranged state must have in a great measure, perhaps wholly, been owing to the same cause. Had he, on this last occasion, for the first time experienced the effects of that dose, even then, would the authority of Lord Hale have applied to his case, and disabled him from pleading the delirium as an excuse. But, having once, on a former occasion, suffered so severely, he must have known, and is to be presumed to have

have known, when he swallowed the second, that similar consequences must inevitably follow; and it is for you to consider, whether that circumstance does not oblige you to hold him still more directly accountable.

To myself, Gentlemen, it appears to be proved, that the pannel was, from the West India fever downward, often in a state of derangement, but that attended with a sufficient degree of reason; and that from the year 1779, till he appears early on the Tuesday morning at the house of Beaufton, or, at furthest, till he appears on the preceding Sunday at Mr Goldie's manse, there is not the smallest vestige of proof, to satisfy you that he was in that state of lunacy, which alone can entitle you to sustain the defence. The evidence of Miss Kinloch, of Walker, and of Reid, as to his conduct and demeanour for the two days previous to the fatal act, is of a nature different from what appears at an earlier period; and upon its weight and sufficiency you will, giving due attention to the observations I have made, determine with impartiality, and according to the dictates of your own conscience.

Gentlemen of the Jury, I have thus gone over a case which I stated in the outset as attended with some degree of difficulty, and on what that difficulty is founded I have endeavoured to explain. It is but fair I should acknowledge, that there are many circumstances attending his conduct during the 48 hours prior to the event, which are favourable to the defence; and the evidence of Dr Home, of what passed betwixt him and the late Sir Francis, is of the same nature. It is for you, Gentlemen, to consider what weight these circumstances ought to have, when contrasted with those which I have already suggested for your consideration. If he had been really insane, it certainly was the duty of his friends to have taken long ago the necessary and proper steps for having him secured; even still, they have not advised him to plead that in defence. He admits that he is sane and well at this moment, and that he is competent to stand trial before you. The rapidity of his recovery from the alleged state of insanity, and the very short duration of it, if it existed at all, or to a sufficient degree to exculpate, are now the subject of your impartial and serious deliberation.

To those false, idle, and indecent reports, which I understand have been circulated out of doors, respecting this trial, you, Gentlemen, will pay as little attention as I do. You know your duty too well, and what justice requires of you, to be biassed on either side in a question of this nature, or to be influenced by any thing but the evidence laid before you. We were told, to the astonishment of us all, in the commencement of this trial, that even the pulpit itself had been made the channel of misrepresentation. Be the man who he may, ye cannot but join in feeling indignation at his folly and indecency, who dared on the eve of a solemn trial to anticipate the verdict of an impartial jury, or touch upon a subject which I thought every man had felt to be sacred from discussion. Gentlemen, if any of you have heard these reports, or listened to such a preacher, I am sensible you will disregard them; you will look only to the evidence before you, and decide upon it like honest men.

That the evidence has come out more favourably for the defence, than I had reason to expect, a feeling of justice has already compelled me to acknowledge. Where the force of these is weakened, and what are the topics, to which you, on the part of the public, ought to attend, I have endeavoured to point out: Should the result be, to balance the whole nearly equally on your minds, God forbid, that, where the life of a fellow-creature is concerned, I should attempt to persuade you, were the attempt likely to succeed, that the scale should not be inclined to the side of mercy.

## MR HOPE'S SPEECH.

*My Lord Justice Clerk, and Gentlemen of the Jury,*

I FEEL myself greatly agitated. I have waited with extreme impatience for the present moment ; and, now that it is come, I wish I may have either strength or recollection to give utterance to the multitude of ideas which crowd upon me : the subject really overcomes me, and I hardly know how or where to begin.

You have heard a very ingenious speech from the learned Lord, and I must in justice add, a very candid one ; a speech, in point of candour, just what I expected, and every way becoming his honourable mind : Indeed, his candour seemed to be at variance with his duty and abilities, and evidently betrayed him into inconsistencies, which even his eloquence could not disguise. But, before proceeding to reply to him, or to give you my own observations on this case, there is one preliminary view of it which I cannot refrain from giving you, because it has made the strongest impression on myself : It is indeed affecting beyond measure, and teaches how vain and fleeting are even those enjoyments here, which we are the best entitled to call our own.

Gentlemen, I desire to call to your remembrance the honourable testimony which you have heard of the prisoner's character prior to 1780, and to contrast it with the subsequent melancholy change. See him entering early into the army, the second son of an honourable house, himself possessed of an independent fortune, embracing the profession of a soldier, for glory, not for profit, and devoting himself to the service of his country, only for his country's sake : See him entering into that profession, of all respectable professions the most respectable, himself the most respected officer in the line. You heard the character which was given of him by those who knew him well, who have come from the extremities of the Island, to which the summons of this Court could not have reached them, voluntarily, to support a fellow soldier in distress, and who, by doing justice to his character for friendship, generosity, benevolence, humanity, and every social and amiable accomplishment, have, in the most decid-

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ed manner, proved their own title to share in the praises they bestowed. "Beloved and esteemed in his own regiment by both officers and men, respected by the whole line, and in every point one of the most amiable characters they ever knew," were the words of his companions: Noble and generous friends! I know not whether to admire most, yourselves who give, or your now unhappy friend who deserves such testimony.

Such was Major Gordon, when in 1780 he sailed to the West Indies, to that malignant and accursed climate, which has been the grave of millions, and which seems to have been ceded to Europeans by the wrath of Heaven, to be a scourge and punishment for the horrid barbarities they have acted there. Such was he, when he sailed, commanding a regiment of his brave countrymen, all flourishing like himself in youth, and health, and spirits. View now the dismal melancholy change: By heavens! I cannot bear it; O God, thy ways are just, but sure they are inscrutable! If virtue, honour, and humanity, ever deserved thy favour, or entitled their possessors to success and prosperity in this life, as well as happiness hereafter, surely the prisoner would have been the object of thy care: But let me not blaspheme, thy purposes must be served, thy will be done.

Turn then, Gentlemen, to the sad reverse. View the prisoner now stretched on the bed of sickness and of phrenzy; nursed and attended by those friends who have here borne testimony in his favour, and whose friendship, the danger of contagion could not deter from administering to his relief. View him, by their care, restored again to life, only to curse the care which had snatched him from the grave. View him now returned to Britain, alas! how changed; changed, not in reason only, but in his very nature; the whole man absolutely lost; and the amiable and generous Gordon Kinloch, become the sullen, morose, jealous, and troublesome being, which he has since occasionally existed. See him often a plague and affront to that family of which he was once the flower; see him shunned and avoided as a pest, by those very persons who once courted his company, and thought themselves honoured by his friendship; see him wandering from his father's house, coming he knows not whence, going he knows not where, but

but in all places an object of terror and aversion. View at last the concluding scene of this sad tragedy,—his brother fallen by his hand,—himself now answering for his murder: think on this sad change, and let it make you serious; think on the prisoner's fate, then think of the blessings which yourselves enjoy, and let it make you grateful.

But, Gentlemen, mistake me not; think not that I have thus appealed to your feelings, because I have need of your compassion. I desire not mercy, unless you can give it me with justice; I do not think I have occasion to throw the picture I have drawn into the scale; though surely, if the scales were even, it would indeed turn the balance. I have dwelt on this subject, not so much for the prisoner's sake, as for our own. It has taught me a lesson of humility, which I shall not easily forget, and which none of you perhaps may be the worse to learn. It may teach us all to acknowledge, what all already know, that even our characters are not our own, and that our very virtues, as well as the faculties and powers of the body and mind, are subject to disease, to alteration and decay. It may teach us, too, how uncertain and worthless a reward is often human praise. At the other end of the island, Parliament is now employed in erecting a monument to one great man, who, perhaps fortunately for himself, died in that infernal climate; while you are desired to doom to death and infamy one not less amiable, who unhappily survived it.

But I will not longer distress your feelings, to which I have no occasion to appeal; neither will I waste your time in guarding you against those prejudices, which I know you must have imbibed in consequence of the innumerable and infamous calumnies which were propagated on this subject. If you had brought the most inveterate prejudices into Court, I am sure they must soon have been effaced; for certain I am, that the first two hours of this trial, if not sufficient to clear the prisoner, were enough to convince you how vilely he has been abused; by none more than by myself; not, indeed, by propagating the calumnies which I heard, but by too easily believing them: Believing to such a degree, that I at first refused to be his Counsel; and at last only consented at the request of a common and respected relation. But the very first enquiry which I made into this affair, satis-

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fied me, how much injustice I had done the prisoner, and I trust this day that I shall make him reparation.

Gentlemen, fatigued as we are, I shall not trouble you with going into the evidence in detail. I shall take the great features of this cause, referring to the particulars of the evidence, only in so far as may be necessary to confirm the arguments which I shall advance.

But, before proceeding to the evidence, it is necessary to say a word, and but a word, on the law as laid down to you by the learned Lord: I shall not pretend to enter the lists of definition either with the learned Lord himself, with M'Kenzie, or with Hale; they are all great and able men; but I suspect much that they are better lawyers than physicians, and that they have given way too much to a professional propensity to subdivide and methodise. For my part, I shall not attempt to reduce madness to fixed rules; nor to define the different kinds and degrees of it, which I have always found to be as numerous and diversified as the unhappy persons who were the subjects of the disorder. I shall not speak to you in technical language, which none of us probably understand, and which, unapplied to particular cases, and unexplained by examples, conveys to my mind no positive and precise ideas. Indeed, after all the learned divisions and sub-divisions of M'Kenzie and Hale, they are both obliged to confess, that, these notwithstanding, the Jury must judge from the circumstances of each particular case. For my part, I think there is but one just and practical observation on this subject in either of their works: That, whatever may be the general and ordinary degree or symptoms of the disorder in the patient, if a total insanity be upon him at the time, it excludes the possibility of guilt or of punishment. This is common sense, and it can be reduced into practice. By this rule I desire you to try the prisoner; and, if you wish for a definition either of the kind or degree of his insanity, you will find a better one in the evidence before you, than in the abstract and speculative definitions of M'Kenzie or Hale. If you wish for the *kind* or species of his madness, the witnesses will tell you, it was of that kind as to make them apprehend mischief either to himself or to others; to make *him* apprehend plots, and mischief,

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and danger from all around him, particularly his best friends, which Dr Monro told you was the never-failing and strongest symptom of entire madness. It was of that kind that made Somner say, he had no doubt that he would have shot any person who attempted to seize him; it was of that kind, which made Fraser think him "*dangerous to mankind.*" Descriptions like these, from persons who witnessed his behaviour, are worth all the divisions and definitions of the learned Lord, and his two learned authors.

If you wish for the *degree* of his disorder, it is in some measure implied in the above description of its kind, and can be further read in the advice which every person gave to confine him, and in the preparations which the family had actually made for coercion. Indeed, his madness seems to have passed *degrees*, and to have arrived at its *crisis*, as Fraser emphatically termed it.

If therefore, Gentlemen, you are satisfied, from a review of the evidence, that his case does correspond with the above description of it, you will acquit the prisoner, although you should not find his case to agree exactly with the presumptuous definitions of the lawyers: Presumption indeed! to attempt to trace the infinite varieties of a disordered imagination, which, even in its sound and natural state, is the most boundless and unfettered faculty of the human mind. We, Gentlemen, will pursue a humbler and a safer path; and, instead of endeavouring to arrange, and class, and define and limit madness, we will endeavour to trace its progress and effects in one individual unhappily afflicted with it.

I shall now, Gentlemen, proceed more directly to the case; and I wish first to call your particular attention to an argument and admission of the learned Lord, while it is fresh in your recollection, and of which I wish you never to lose sight. It is decisive of the case for the prisoner; and I was astonished that the learned Lord could dwell on the topic so long, without observing the fallacy of his argument.

He admitted that it was proved by a variety of witnesses, particularly the gentlemen from England, that the prisoner



prisoner had been frequently deranged to a very considerable degree. But he contended, that their testimony must be thrown entirely aside; because, whatever was the actual degree of derangement to which the pannel had formerly been liable, his relations, who are proved to have known of it, did not conceive it to be total or dangerous, because it was proved that they had never thought of taking any measures for securing him. Now, this certainly proves, as the learned Lord has justly stated, that his derangement had never before, (except in the instance sworn to by Dr Farquharson), amounted to total and absolute insanity—That his disease had never before come to a *crisis*, to use the emphatical words of Mr Fraser—That his relations were not afraid of mischief from him, at least to others. But, because he never *before* was totally and dangerously insane, could any person have justly concluded that he never *would* be so; or is it any proof that he was not *at the time* of this accident? I admit, in the words of the learned Lord, to which I beg to refer you while they are fresh in your recollection, that his derangement on former occasions does not appear to have made such an *impression* on the family, as to suggest to them the propriety or necessity of adopting any mode of coercion. I admit with the learned Lord, that the impression which his family had of his former attacks, is the best evidence we can have of their nature and degree. In this admission, I perfectly agree with my learned friend. I desire to press it most earnestly upon you, for it is an admission from which I will not suffer him to depart. But, if the impression which his disease made on his family on former occasions, is to be evidence that he was not totally mad, what will the learned Lord make of the impression and conduct of the family on the last occasion? What will he make of the very same impression entertained by every friend of the family? What will he make of the advice which they received from those friends, whether of the profession or not? If the impression which his situation made on the family is to be evidence, and it certainly is the best, then what was their impression at the time of the melancholy event? Is it not proved that every member of the family was convinced of the absolute necessity of immediately securing him? Is it not proved that every friend who saw him was of the same opinion? Is it not proved

proved that they gave the family, and in particular Sir Francis, information of their opinion, accompanied with the most earnest and decided advice? Was not this advice seconded by their medical friends, who, to the common observation of mankind, added the certainty of science and experience? Did not this impression travel with the prisoner from place to place? Wherever he was seen, did not persons, without communication or concert, instantly conceive the same opinion of him? He is seen in Edinburgh as early as the 28th March by Dr Home and Dr Farquharson, who communicate their observations of his malady to each other. Dr Home informs Sir Francis, who instantly tells him he had observed the same. The prisoner goes to Gilmerton; his situation is remarked by his sister, who communicates it to Mr Somner; but she only tells Somner what he had observed before. He goes to Mr Goldie's, who forms a decided opinion that he ought to be secured; Mr Goldie goes to Gilmerton to impart this opinion to Miss Kinloch, who meets him only by telling him that she had already anticipated his advice, and had sent for Somner. Somner and Frazer come to Gilmerton on the Monday morning, and not only advise, but urge and expostulate with them on the necessity of securing him. At last, on the fatal night, Walker sends from Beaufield a message by Reid, to send up all the servants for that purpose; and Reid, in the very act of delivering the message, is frightened by the prisoner's appearance. In the course of the evening, M'Millan interposes with similar advice, and obtains permission to write for Somner; and how does he write? he writes as of a matter perfectly familiar, and of which they were all perfectly aware. He desires him to come immediately, and bring with him *what is necessary*. Does this appear vague and inexplicit to Somner? Is he at any loss to interpret it? No; and how does he interpret it? he understands it at once to mean a keeper and a strait waistcoat; so well did he know what the family thought, and what they had intended to do. When he comes with the apparatus, does he retract his advice, or do the family alter their opinion? Is their "impression," to use the learned Lord's favourite word, altered or diminished? No; Somner continues to advise, and they to resolve: not satisfied with the assistance in the house of three or four men servants, besides a post-boy from Haddington,

Haddington, they send for three labourers from the farm. Here is another impression for the learned Lord, an impression of danger, as well as of necessity. They must have seen ten thousand circumstances in his behaviour, which cannot be conveyed to you by description, before it would have been thought necessary to take such precautions as these. But we are told that the farm servants were dismissed, and this is given as a proof that coercion was abandoned. If it was, the event only proves that it was most *foolishly* abandoned; but the contrary is proved; it is indeed true, that the labourers were dismissed, under the delusion of a momentary calm; but is it not proved, that in a few minutes they were again convinced of the necessity of coercion? Is it not proved, that, after his first appearance in the parlour, the servants were called in, and desired to be in readiness in case of his return. When he did return, and Sir Francis followed to secure him, I have no doubt that he expected to find the servants standing ready to assist; indeed this is clear from what, in his dying moments, he said to Dr Home; not finding them there, he attempted it by himself, and by his other brother Alexander; and well might he acknowledge, it was madness to do so.

Such, then, was the impression of the family on this occasion of the absolute necessity of securing him. Had it been an "*impression*" only, I should have maintained it to be good evidence, even although, from false delicacy or other motives, it had never gone beyond an impression. But, in fact, you see them so perfectly satisfied that their impression was right, that they proceeded to act upon it, by making most wise and salutary preparations, and then spoiling all by an injudicious and ineffectual attempt.

But their *attempt*, though fatal to themselves, is sufficient for me. It is better than even the learned Lord's "*impression*;" and proves to demonstration, that they were fully satisfied of the truth of the opinion they had formed, both on the degree of his derangement, and the necessity of coercion.

And now, Gentlemen, in the face of all this evidence, in opposition to the opinion of every friend who saw him; in  
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opposition to the advice of every professional person consulted on the occasion; in opposition to the impression of the family, to the attempt of Sir Francis; you, sitting here, wanting the strong evidence which they had, his eyes, his looks, his gestures, his tones, his whole demeanour; you sitting here, I say, are desired presumptuously to determine, that all, all were mistaken; that the prisoner was not mad, and coercion not necessary; and this you are desired to do;—Why? Because he killed his brother! Wonderful conclusion! If any thing was wanting to confirm the evidence arising from the opinion of the family, that fatal event puts it beyond doubt. If it could be doubted whether Sir Francis too thought him totally deranged; I answer, he has sealed his opinion with blood. They had been taking precautions all night against danger and mischief from the prisoner; and, when the dreaded mischief happens, it is given you as a proof that their precautions were unnecessary; admirable logic! That they apprehended danger is clear.—Why? They have told you because they thought him mad; the mischief happens; and that which they dreaded as the natural consequence of his madness, you are to take as a proof of the soundness of his understanding.

Gentlemen, I am tired with dwelling upon this topic. The defence arising from the conduct of the family is such, that I cannot conceive what answer can be made to it. The learned Lord, I am sure, can make none; for, the argument was his own, and most sincerely do I thank him for it. For my own part, I think we have proved much more than we were bound to do; for, if there had been ten times less evidence of insanity by others, and in other respects, I think the conduct of the family would be evidence enough.

Gentlemen, this leads me to put a question to the learned Lord, of which he does not seem to be aware. He has contended that the prisoner's malady was mere melancholy and depression of spirits—that he was not mad—was in the perfect knowledge of right and wrong—knew friends from foes—and was perfectly conscious of the nature of a crime. What then must the learned Lord say of the attempt to confine him? Is he prepared to say, that Sir Francis and the family were in a foul conspiracy against the prisoner?

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that they were attempting against him a crime little less horrible than that of which he is accused? Is he aware, that the prisoner's conduct would then have been completely justifiable? for, if there is any crime or attempt in nature, which may be repelled by the death of the aggressor, it is a conspiracy and attempt to confine, as a madman, a person who is not so. The learned Lord was not aware of this dilemma; but I will relieve him from it. He never dreamt, more than I, of charging Sir Francis with such a crime; and therefore he must concede to me, that the prisoner's situation justified the means that were attempted to secure him, and, if successful, would have justified his confinement. I ask no more; and, if the case had been my own, I would have rested it here. But I am too much interested to omit other circumstances, though not so material; and therefore, tired as we are, I think it my duty to proceed.

Gentlemen, I have not yet done with the impression of the family; the attempt of the family to confine the prisoner, is not only good evidence of derangement in general; but what the learned Lord observed, of their having formerly neglected to do so, proves to demonstration, that they never would have made such attempt, but from the most overruling and cruel necessity. If the impression of the family is evidence of the existence of derangement in general, it must also be good evidence of the *measure* of that derangement: indeed the learned Lord has so pleaded it, and I intreat you to keep him to his argument; I again repeat, that I entirely agree with him, that the circumstance of the family never having on any former occasion taken measures for confining the prisoner, is the best evidence, that, in all the former instances which fell under their observation, they did not think the malady arrived at such a height as to require coercion.

But what conclusion is to be drawn from that circumstance, with reference to their conduct on the late occasion? If they did not attempt to confine him formerly, because they did *not* think him sufficiently deranged to require such measures; then, their attempting to confine him on the late occasion, ought and must be held as good evidence that they *did then* conceive his malady to be arrived at that *crisis* (as  
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Frazer expressed it) which rendered coercion necessary, both as the means of cure and the means of safety. If an argument is to be drawn from the conduct of the family, as descriptive of their opinions, that argument must be allowed to make for the prisoner as well as against him. The family, on former occasions, says the learned Lord, did not think the prisoner *totally* deranged, because they neither attempted nor intended to take measures for securing him. The family, on the last occasion, *did intend*, and actually *attempt* against the prisoner, the most marked and decisive means of coercion; and therefore, they *did*, on this occasion, consider him to be *totally* insane. This is sound argument and sound sense, unless my understanding too be woefully deranged.

Gentlemen, the conduct, however, of the family, becomes much stronger evidence of the measure and degree of the malady, when the nature of the disease, and the feelings of the family, are considered. Madness is a disease, which the family would not be very willing to admit, and still less to proclaim; the fever, which was the cause of it, happened abroad, and seems to have been little known in this country; for which reason the family might justly be apprehensive, that the world would conceive the malady to be of the hereditary kind. I say, therefore, it is a disorder which you will not presume the family would be very willing to admit; you will not presume that they would make any unnecessary exposure of their friend's misfortune, when they were sure that the world, with a most uncharitable perverseness, would turn his misfortune to the family's disgrace. When, therefore, you see the family attempting decisive and public measures against the prisoner, you may safely conclude that it was not unnecessarily done. No slight, no common degree of derangement would drive them to measures so repugnant to their feelings, so repugnant to their interest. This would have been the fair presumption, even if there had been no evidence of the feelings of the family on the occasion; but it is not left to presumption; it is proved incontestably, that the family did know and feel how deeply their honour and their interest were concerned in the measures they were taking. Sir Francis seems to have been particularly alive to the distresses of their situation. Has not Frazer proved to you, that, when he urged him, in the garden on Monday forenoon, to secure

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the prisoner, (his malady, in his opinion, being then come to a *crisis*, as he emphatically expressed it,) Sir Francis seemed much concerned: But concerned for what? Was it for the prisoner only? No; A good man like him could not but feel concern for a brother in such a situation. That would never have struck Fraser at the time, and still less would it have occurred to him to mention it now: but he added, that Sir Francis seemed to feel it as a *family affront*. These were his words; and so much did the witness consider Sir Francis's concern as arising in part from that cause, that he has sworn, he thought it necessary to expostulate with him on the subject, and to remind him of the variegated nature of human affairs, and the imperfect state of happiness below.

And is Sir Francis the man, whom you are to suppose would, within 24 hours, not only direct, but himself personally attempt, a measure which he considered thus to be affronting to his family, without the most decided and determined conviction of the necessity of the painful step which he found himself compelled to take? Still, however, you see that he could not divest himself of his feelings; the family affront still appears to have dwelt on his mind, and to have produced that fatal irresolution, that false delicacy, that criminal lenity, I had almost called it, which was the true cause of the unfortunate event. We find him directing his confinement one moment, and countermanding it the next; at one time sending for the assistance of the farm servants, and then dismissing them on the most equivocal appearance of abatement in the disorder, or rather on the fallacious symptom of a temporary calm; and at last, when he did attempt it, doing it in such an undecided and ineffectual manner, as clearly proves the confusion and disorder of his own mind, and how much his feelings were struggling with his duty. Had Sir Francis been as firm and determined in conducting the attempt, as he was convinced of the necessity of it, the prisoner might now have been blessing him for his kindness, instead of lamenting his loss, and blaming his indecision. Infatuated conduct! unaccountable, but on the supposition of a struggle between his feelings and his conviction: for what else could make him trifle and hesitate, after he had once taken his resolution, but his extreme aversion to incur this

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family affront ! But, however fatal that irresolution was to him, however cruel to the prisoner, however much I may, as a man, join with the prisoner in deploring the indecision of his brother, yet, as his counsel, I did rejoice to hear it : it proves, beyond the power of cavil or of sophistry to obviate, with what extreme reluctance Sir Francis yielded to the advice of his friends, and the conviction of his own senses : it proves how completely he must at last have been convinced of the necessity of coercion, before he brought himself to attempt it : it proves that he apprehended still greater disgrace to the family from his brother being at large, than could arise from his confinement : it proves that he did not attempt to secure him, till he not only saw that the affront was unavoidable, but that censure and disgrace would fall on him, if he resisted longer the conviction of his mind : he failed in the attempt ; but the attempt proves his conviction, and his last breath bore testimony to the necessity of his conduct.

Gentlemen, were the cause my own, I would leave it here. I can never strengthen it ; I cannot foresee what answer can be made to the evidence arising from the conviction of the family ; if there were no more in the cause, I must prevail ; prevail, by the admission of the prosecutor himself, for the evidence arising from the conviction of the family, was his own argument, and I have only made the proper application of it.

But, Gentlemen, on the part of the prisoner, we have gone a great deal farther ; you have the clearest proof of the opinion of the family, and you have your notes before you ; I desire you to say, if either there, or in your memories, you can find one circumstance, tending even to a suspicion, that the opinion of the family was wrong, that their measures were unnecessary, that the prisoner was not insane : I know you cannot ; on the contrary, I could prove to you, that every one circumstance, which has appeared in evidence, tends more strongly than another to justify the opinion of the family, and to prove the prisoner's complete insanity, had the conduct of his friends been less convincing on the subject.



I will not weary you, Gentlemen, by detailing the evidence, because, I think I see that you are already with me; allow me only to recall to your recollection the leading circumstances of the case. First let me ask you, Gentlemen, is there any thing *improbable* in the allegation that the prisoner was insane? Was he an unlikely person to be insane? Or was he not just such a man, as, to use his father's prophecy of him, would one day be confined; had not insanity become in him an habitual disease? Was not his system predisposed, I think they call it, to this disorder? Had it not a most adequate and melancholy cause? Will it be said that a West India fever does not often leave behind it occasional derangement? Will it be said, that it did not do so in the present instance? Look back upon the evidence of his brother-soldiers, who first discerned the effects of the disease; a body of evidence, which I was not at all surprized to hear the learned Lord desire you to lay out of view. Mark the progress of the disorder; has it not been proved, that his family and friends thought it growing on him? Did it not once before end in confinement? and is it so extraordinary that it should end in it again? Is it not natural, nay, is it not proved to you, that repeated attacks of insanity weaken and unhinge the mind? Is it not known, that the mind in that state preys upon itself, and that every attack of the disorder is in itself, in some degree, a cause of its return? Are you surprized to find insanity, even without a cause, in one who had been occasionally subject to it? Are you surprized to find a total insanity, in one who had been often partially deranged? But has not the cause of the present attack been proved; or, at least, has it not been traced back to a stroke which his mind had very lately received? Within less than two months of the accident he had lost his father; it is proved that he loved him with the most filial piety; it is proved that he paid him uncommon attention during his last illness; it is proved that he was extremely affected by his death. Were it necessary, I might argue that this is no trifling ingredient in this cause; a man who has shown such warmth of affection for an aged parent, at a time when those instincts are supposed to be much effaced, is not the man, whom, in two short months, you would expect to find the wilful murderer of his brother. I have no occasion, however, for an argument like this,

this, and therefore shall not dwell upon it; but it is proved that he was uncommonly affected by his father's death: Gentlemen, we have all suffered the loss of dear relations; I hope we too have felt all that nature ought to feel. But, we met those afflictions with sound minds and vigorous understandings; we were capable of receiving the consolations of business, of philosophy, and of religion, and of allowing them all their proper force; we gradually resumed our relish for friendship and society, and were comforted: but can any of us pretend to say, what effects such afflictions might have had upon us, if we had met them with a mind, weakened, unhinged, and shattered by previous calamity? had insanity been lurking in our system, can we say, that such affliction might not have called it into action? That it did so with the prisoner, is proved beyond a doubt: It produced, at first, as was most natural, uncommon depression of spirits, not mere ordinary grief, but what the prosecutor himself admitted, did amount to real, but partial derangement; this was followed by an uncommon agitation of the nervous system, not arising from intoxication (as it seemed once attempted to be proved, though it has been since abandoned,) but from the progress of his distemper; this was accompanied with a restlessness, an incapacity to remain any time in one place, and a desire to wander and hurry about, which would of course increase the agitation and irritability of the system, till, by a complication of causes, it ended in the delirium and insanity which is our present defence. Is there any thing unnatural in this? Does the effect not correspond with the cause? Is not the *disorder* just what you would have expected, from a mind so previously unhinged? Were not the *consequences* just what you would have expected from a mind so totally deranged? His friends and family thought him dangerous both to himself and others; had the mischief happened to himself, as it is too plain he intended, who would have been surprised? But is it less surprising that it should happen to another? *Both* were equally dreaded by his family; else why bolt their doors, and why so much preparation of assistance when it was resolved to seize him? The friends apprehended danger from his insanity, and when the danger happens, which they dreaded, it is given you as evidence that their fears were vain; amazing conclusion! That the very circumstance, which, if there  
were

were any doubt of his insanity, is of itself almost enough to prove it, should be considered as throwing doubt and perplexity on a case, in which every soul concerned has told you that they had none ; every witness who saw him recently before have told you, that they dreaded mischief from his insanity ; the mischief happens, and then the insanity is denied !

I think, then, Gentlemen, I have shown, that the opinion of his family is completely corroborated by the probabilities of the case ; and that both the disorder itself, and the fatal effects of it, are exactly such as were to be expected from the previous habits and situation of the prisoner's mind, unhinged by disease, shattered by repeated attacks of derangement, and at last shocked by a grievous and recent affliction.

Let us now enquire, Gentlemen, if the state of his body, if his actions and his conduct correspond with the opinion which his family had formed.

On the subject of the state of his body, some questions were put at an early period of this cause, by two gentlemen of the jury, who from those questions I perceived were gentlemen of the profession. I am not myself qualified to judge, whether the circumstances they alluded to are or are not proper and decisive symptoms of derangement. But I conclude that they are good judges ; and I desire you only to judge of the prisoner's condition by the questions which they put. One of them put this question to Mr Somner, If want of sleep, and an uncommon capacity to resist the calls of hunger and the impressions of cold, were not usual and decided symptoms of insanity ? Mr Somner told you, that his experience of the disease did not enable him to give a decided answer. Still less does mine, although I certainly have heard, that those are usual and strong marks of madness. I presume at least that the gentleman thought so, who put the question.

Let us now then examine his situation, with a view to this question, and see what answer it suggests.

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As to want of sleep, it is proved beyond all controversy, that this was his *constant* complaint. Miss Kinloch has proved, that on Sunday he was wandering the whole night up and down the house of Gilmerton, from room to room, and tossing himself on every bed. When his brother and M'Millan saw him at Haddington on Monday, at the time when Somner brought him to the inn, it is proved, that when his brother asked him how he did, he answered, "Oh, 'Sandie, I am very ill, I cannot sleep." It is proved, that late on Monday evening, he made his escape from them, as they were carrying him to Gilmerton; and it is also clear that he had wandered in the woods all that night. It is therefore established, that, for two nights at least previous to the accident, he had not closed his eyes, besides the *constant* complaint of want of sleep, to which he had been previously subject. Walker at Beanston, indeed, seems to think that he slept some hours while in his house; I think this extremely doubtful, from the condition in which Walker found both the prisoner and his room, when he went up to waken him. But let it be held that he slept at Walker's, I will yield that to the prosecutor; but still it is proved, that want of sleep was his constant complaint. It was probably both the cause and the effect of his disease; and, if he did sleep at Beanston, and yet awoke in the outrageous state which Walker and Reid have described, it only proves more strongly the settled and serious nature of his malady, which gained ground, notwithstanding a comfortable sleep, the most likely and effectual means of producing an abatement. Whether, therefore, he slept or not, is indifferent to me; if he slept; and yet awoke more deranged and outrageous than ever, the more violent and decided must be his insanity. If he did not sleep, then it accounts for the degree and progress of the disease. But for me it is enough to shew, that want of sleep was his constant complaint, and that, in fact, he had not closed his eyes on Sunday and Monday night. Follow him to Gilmerton, and you will find the same complaint. When Sir Francis had seen him to his room, and asked him how he did, he answered him by complaining that he could not sleep nor rest; and, in point of fact, you find that he was spending that night in the same restless and agitated state as the two preceding, for, at

three



three in the morning, when the accident happened, he had not closed his eyes, and was wandering through the house. If then, Gentlemen, want of sleep be a symptom of insanity, as I do believe it to be, both from my own information, and from the question put by one of yourselves, I think it is proved in this case to no ordinary degree. But I also believe that want of sleep is not only a symptom of insanity, but contributes powerfully to the progress and violence of the disease; in which case, this circumstance acquires additional importance, and fully accounts for the disorder having made such rapid progress in so short a time.

Now, as to his resisting the calls of hunger, we could have brought complete evidence on this subject, if our fatigue had admitted of it; for, we have every person in waiting in whose house he had been for at least a week before. But enough is proved, to establish that one of his symptoms was a total want of appetite. Dr Home and Dr Farquharson have proved, that a total want of appetite was one of his complaints some time before he left Edinburgh; and, to come nearer the fatal event, I think you have every reason to believe, that he had not tasted food for at least 48 hours preceding. Mr Goldie has proved to you, that he arrived at his house from Dunbar about half past three on Sunday; consequently his last meal that day, must have been his breakfast at Dunbar. He refused to eat at Mr Goldie's; and, though he asked for a little toddy, that witness has told you that he was unable to carry it to his head. He remained with Mr Goldie near two hours; and, before he arrived at Gilmerton, it is proved that dinner was over, that he refused to eat, and in fact he took nothing but a little brandy and water that night. On Monday morning it is clear that, instead of food, he had taken poison, to counteract which, he was made to drink several gallons of hot water, a circumstance which would add to the debility of his system. He left Gilmerton on Monday about two; and, after going half way to Edinburgh, he returned to Haddington, where Somner brought him to his brother and Mr Millan, and there it is proved that he could not eat, although pressed to do it; at night he made his escape from the chaise, and, after wandering in the woods all night, arrived

arrived at Walker's at Beanston about five in the morning ; and Walker has proved that he had nothing there but a sawcer full of tea ; some toasted bread was brought, but he could not eat it ; from that he went home to Gilmerton, when it is proved, that though he once asked for meat, he could not eat it when it was brought.

If, then, a want of appetite for food, be another symptom of insanity, in what stronger degree would you wish it to be proved ?

Patience of cold is stated as another symptom ; do you desire evidence of that ? See him wandering all night through the house of Gilmerton almost naked ; and, if that will not satisfy you, follow him to the woods of Beanston, and there view him, " stretched out and bleaching in the northern blast."

Let, then, the Gentleman of the Jury who put that question receive his answer, that patience of hunger, cold and sleep, are symptoms of insanity, and that they concurred in the prisoner to no ordinary degree.

So far then, I say, that the opinion and impression of the family is again confirmed by the state of the natural functions and appetites of the body, as well as the tenor of his mind.

Now, look to his actions and his conduct, to his demeanour and whole behaviour, from which every professional man has told you that insanity is most easily perceived. But alas ! Gentlemen, all these circumstances, which made such impression on the witnesses, are lost upon us. Description fails us here ; language cannot describe looks, and gestures and demeanour ; there is indeed a language of the eye, but it can be expressed only by the eye, and, when that is not seen, the impression cannot be conveyed. You have indeed been told of the wildness of his looks ; but you cannot conceive this by description, nor can you understand the degree of wildness, otherwise than by its effects on those

who saw it, *they* believed him, from his looks, to be totally deranged, and *you* must believe *them*.

As to his gestures and demeanour, turn to the evidence of Frazer, of Walker, of Reid, and Somner. I will not follow them minutely. But you cannot have forgot Frazer's description of his loading the blunderbuss on Monday forenoon. But surely the loading of a blunderbuss or pistols, by a person just stepping into his chaise for a journey, is in itself neither an uncommon nor a terrific occurrence; and yet Frazer told you he was in the greatest alarm, and expected every moment to see the blunderbuss levelled at himself. What alarmed him, I say? Not the mere loading of the blunderbuss. But he had marked his mad demeanour. It was his eye, his looks and gestures, the terrible agitation of his whole frame, which was soon afterwards observed by Somner, even when the prisoner was half concealed by his chaise. All these things gave both these gentlemen the most decided conviction of his insanity; and their opinion ought to carry conviction to you, for it is their *opinion* in this case to which you ought to give weight, and not to their description, which can give no adequate idea of his condition and behaviour.

Recollect also the numberless circumstances to which Somner has sworn. Begin with the scene at Haddington; view the prisoner wandering from the room to the yard, from the yard to the garden, from the garden to the street, from the street back to the room, in such a manner and such a condition, that you see it was thought necessary to give the ostler orders to watch him. See him next on his road to Gilmerton, whither his friends were carrying him for the best of purposes, making his escape from the chaise in the middle of a dark and dreary night. From what and to what did he escape? He escaped from his best friends, from those who meant his good, from his only means of security, to wander in the woods of Beanston, and dwell with the beasts of the field. And yet this is the knowledge of good and evil, of friend and foe, which you are desired to believe, although I observed that the prosecutor never once ventured to put those questions, after the remark which I made upon them during the examination of Mr Somner.

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But let me proceed with the deposition of that gentleman. Follow him on the fatal night, and you will find his account of the prisoner's behaviour pregnant with innumerable proofs of the most decided insanity. His perpetual restlessness, his incoherent conversation, his threats to shoot Somner at the head of the stairs, his affection for Sir Francis at one moment, his suspicion that he had poisoned him the next, his wandering through the house half naked, and lastly his frantic and outrageous gestures, when he came down to the parlour first, when the final resolution was taken to secure him, and again at the time of the insatuated and ineffectual attempt.

If these circumstances in his conduct are not thought sufficient to support the opinion attempted and of the family, turn to the evidence of Walker and of Reid, and you will find abundant confirmation; I will not repeat what they have told you; they were among the last witnesses, and I saw the strong impression which their evidence made on the whole Court: one circumstance only I will mention, the vision of the light from Heaven and the burning bath; visions such as this, are the constant effects of a disordered imagination, and the horrors of them never fail to increase the insanity by which they are produced.

I leave the rest of Walker and Reid's evidence to your own recollection; I am sure it made a sufficient impression on you, and I think I may venture to say, that not one of you would have changed places with them, to be Lord of the British Empire.

But, Gentlemen, extend your views beyond the fatal event, and you will find that the impression of the family continued exactly the same; What was their first instinctive movement? Was it to apprehend a felon? No; It was to seize, overpower, and secure a madman, it was to carry into execution the attempt which Sir Francis had so egregiously mismanaged, in short it was to apply the strait waistcoat, and thus, in the strongest manner, established the opinion of the family on the nature of the deed.

From his behaviour, however, after the accident, the learned Lord has drawn the only thing like an argument in support



support of the prosecution; he argued, that he could not be insane, because, after the event, he recollected what he had done; but, Gentlemen, that by no means disproves his insanity. The most complete insanity is not attended with a total loss of memory; else how could madmen remember their keeper, and those circumstances which make them stand in awe of him. Nay, in some points, the memory of madmen is most perfect and tenacious; they never forget an injury, they never forget their revenge; but, Gentlemen, the recollection which the prisoner showed of the fatal event, must be taken altogether, and then the argument founded on it falls instantly to the ground. How did he recollect the event? Did he recollect it as it really happened? Did he recollect it unconnected with those frantic notions which he had previously conceived? What did he say to the servants who seized him? he called out to them to let him alone, for he had not an hour to live: Does not this prove that he was still under the impression, that his brother had poisoned him? Remember too, what he said to Mr Goldie, That he had been poisoned, and that there was a deliberate plot to murder him that night, and that what he did was in self-defence. And yet this is the recollection from which the learned Lord would infer the soundness of his understanding. Dr Monro, however, who knows a little more of insanity than either of us, gave you his opinion, that such groundless jealousies and suspicions against friends and relations, was a constant and certain mark of perfect madness. What the prisoner therefore said of the event, must be considered more as the creation of a disordered imagination, than the impression of a sound and sane memory. But, says the learned Lord, we find him perfectly recollected a few days afterwards in Haddington jail; and he seemed to treat so rapid a recovery as impossible. But, first, I deny that he was perfectly recollected. He may have been so at times; but Dr Farquharson has expressly told you that he found him often very incoherent; As to his rapid and perfect recovery, I wonder in what part of the proof the learned Lord found that; Dr Monro, and Mr Bell, indeed, who visited him only for a few minutes once or twice a-week, did not observe insanity; but they most candidly and scientifically told you, that this could afford no proof that he might not be often incoherent at other times; accordingly Drs Hume and Farquharson, who saw him

him daily, sometimes twice or thrice, have told you that he continued to be frequently deranged ; nay, did not he once behave in so outrageous a manner as to determine Major Mackay never to return to see him ? did not he say so to Dr Home, as they went down the stairs of the prison ? and did not the Doctor answer, that it would be absolutely necessary to apply the strait waistcoat, if he continued equally outrageous ? What, therefore, could the learned Lord mean by a rapid recovery ? That, in some short time, he grew comparatively better ; that now, at the distance of two months, he is, thank God, as well as his grief and sorrow, and anxiety, will permit him, is true ; But that his recovery was so rapid and extraordinary as to throw doubts even on the existence of his disorder, I am sure that no man who hears me will believe.

But the learned Lord, in this, fell into a manifest inconsistency ; he has now argued that he could not be *very* much deranged at the fatal moment, because he became so soon well ; but the learned Lord was pleased, in another part of his speech, to make a much more rapid recovery for the prisoner, than that which he has treated as impossible. He seemed very candidly to admit, that his behaviour at Walker's at Beaufton was such, that, if he had committed mischief on him, it could not have been murder, on account of his insanity.—This was about six o'clock in the afternoon ; and yet, by three next morning, that is in nine hours, he supposes such a rapid recovery as to make that murder then, which would have been madness at Beaufton. This is a cure infinitely more wonderful, than the prisoner's recovery !

I will not, Gentlemen, dwell a instant on the case of Lord Ferrers.—It agrees in no point with this, but that the word madness occurs in both ; Lord Ferrers did not fail in proving that he had been occasionally deranged, but he failed totally in proving that he was deranged at the time, or rather it was clearly proved that he was in his perfect senses ; but we have not only proved previous derangement to no slight degree, but a derangement at the time, gradually increasing till it ended in a crisis of delirium ; Lord Ferrers was proved to have acted from the most determined revenge, and to have laid his schemes in the most deliberate manner ;

manner; while, previous malice in the prisoner here, though once attempted to be proved, is now expressly given up; and, as for deliberation, it is absurd to talk of it. In short, while justice and law exist, the cases of Lord Ferrers and of the prisoner will ever be regarded as in exact opposition and contradiction to each other.

I think I am now, Gentlemen, drawing to a conclusion. I think I have marked the great and leading features of this case, to which it is proper for you to direct your attention; many things I have no doubt omitted; some indeed I have omitted by design, for I wished not to distract your attention from the leading circumstances of the case; and, relying on the goodness of my cause, I wish you to retire, before you are completely exhausted; for, the sooner your judgment, the more certain my success. I am indeed confident. It is not usual for a counsel to deliver his own opinion, nor perhaps is he entitled. But the example has been set me, and perhaps even my opinion may carry some weight and authority along with it; perhaps also I owe it in justice to the prisoner, for having once listened to the calumnies against him; with truth then and pleasure I can say, that the very first day's enquiry which I made into his case, effaced the prejudices I had conceived. My opinion has every day grown stronger in his favour; and now, laying my hand upon my heart, and as I hope for mercy at the throne of heaven, I can say, that, in my conscience, I believe him innocent.

## LORD JUSTICE CLERK'S CHARGE to the JURY.

*Gentlemen of the Jury,*

That Sir Francis Kinloch was killed by the hand of the pannel, is proved beyond a doubt; you have therefore to consider the defence on his part set up. Now, it will occur to any man of sound sense and judgment, that there are different degrees of insanity.

If a man is totally and permanently mad, that man cannot be guilty of a crime; he is not amenable to the laws of his country. There is no room for placing the pannel in that predicament; for, as a person, totally and absolutely mad, is not an object of punishment, so neither is he of trial.

The next insanity that is mentioned in our law books, is one that is total but temporary. When such a man commits a crime, he is liable to trial; but, when he pleads insanity, it will be incumbent on him to prove that the deed was committed at a time when he was actually insane.

There is still another sort of distemper of mind, a partial insanity, which only relates to particular subjects or notions; such a person will talk and act like a madman upon those matters; but still if he has as much reason as enables him to distinguish between right and wrong, he must suffer that punishment, which the law inflicts on the crime he has committed. You have therefore to consider the situation of the pannel, whether his insanity is of this last kind, or whether he was, at the time he committed the crime, totally bereaved of reason. For, if it is your opinion from the evidence, that he was capable of knowing that murder was a crime, in that case you have to find him guilty.

Gentlemen, this is a question of some nicety. You have the testimony of certain witnesses, that he was correct and coherent in his answers; and you have, on the other hand, evidence that he was totally deranged by a fever in the West Indies. In regard to a later period, the conduct of the family with respect to him, is also to be considered.

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It has been observed for the prosecutor, that no steps were taken to secure him, till just before the accident happened, whence it is attempted to be enforced, that the family thought his disorder only a sort of melancholy, and not a derangement of such degree as required confinement. I must say, that if this event had taken place eight days sooner than it did, this circumstance would have come with very great force against the pannel; but, in the actual circumstances of the case, it comes with more force in his favour, and is a consideration of weight upon his side. For, it is proved that a nurse had actually been provided to take care of him, and a strait waistcoat prepared to put on him; and pity it is that this plan was not timeously put in execution.

Gentlemen, I shall not take up more of your time. You will consider the evidence well, and decide according to your consciences. If you are convinced that he knew right from wrong, you will return a verdict of guilty. On the other hand, if it shall appear to you that he was not able to distinguish between moral good and evil, you are bound to acquit him. But Gentlemen, I think that, in all events, a verdict of not guilty, is not the proper verdict for you to return. I think you ought to return a special verdict, finding that the pannel was guilty of taking the life of his brother, but finding also that he was insane at the time.

It was upon Tuesday morning about seven o'clock when the Lord Justice Clerk concluded his speech. His Lordship proposed, that the Court should adjourn, after appointing a time for receiving the verdict : But, on a suggestion from one of the Jury, (in which the rest concurred, after conversing together in a whisper, for a minute or so,) the Court agreed to sit until the verdict should be returned. The Jury were accordingly inclosed ; and, after being absent about 35 minutes, again appeared in Court, with a verdict written out in the following terms.

### THE VERDICT.

*At Edinburgh the 30th June, 1795.*

The above affize having inclosed, made choice of the said Andrew Wauchope of Niddry Marischal to be Chancellor, and of the said Elphinston Balfour to be their clerk ; and, having considered the criminal indictment raised and pursued at the instance of his Majesty's Advocate, for his Majesty's interest, against Sir Archibald Gordon Kinloch of Gilmerton, Baronet, pannel, the interlocutor of relevancy pronounced thereon by the Court, the evidence adduced in proof of the indictment, and evidence adduced in exculpation, they all in one voice find it proven, that the pannel killed the deceased Sir Francis Kinloch of Gilmerton, Baronet, his brother-german, in the way and manner mentioned in the Indictment ; But find it proven, that, at that time the pannel was insane, and deprived of his reason. In witness whereof, their said Chancellor and Clerk have subscribed these presents, in their names, and by their appointment, place and date aforesaid.

{ ANDREW WAUCHOPE, *Chancellor.*  
{ ELPHINSTON BALFOUR.

This verdict having been recorded, and read by the Clerk of Court, the Jury were discharged, and the Court adjourned till Friday the third of July. From that day, however, their Lordships again adjourned till Friday the tenth of the same month ; and then, on  
account

account of Court of Session's sitting later than what had been expected, a further adjournment took place till the Wednesday following.

*Wednesday, July 15. 1795.*

The Court met between ten and eleven o'clock in the forenoon, when, after the usual proclamation had been made, the Clerk of Court was desired to read the verdict of the Jury. The Lord Justice Clerk, as President, then called upon the other Judges who were present to deliver their opinions; which they did *seriatim*, according to their seniority.

*Lord Esgrove.* The Jury, in this melancholy case, have returned a distinct verdict, by which "they, all in one voice find it proven, that the pannel killed the deceased Sir Francis Kinloch of Gilmerton Baronet, his brother-german, in the way and manner mentioned in the indictment; but find it proven, that, at that time, the pannel was insane, and deprived of his reason." It is now to be considered by the Court, what must be the legal consequences of this verdict.

The crime charged against the pannel in the indictment, is the crime of *murder*, which, being one of the deepest dye, and aggravated in this case by the near relation between the parties, is indeed hardly credible to have been committed by any person endowed with the feelings and faculties of the heart and understanding; and we have here conclusive evidence from the verdict (which is our rule) that although the shocking deed of killing was committed, yet the perpetrator was at the time, by the will of God, deprived of that most invaluable gift of reason, the distinguishing blessing and ornament of the human kind. In this miserable situation, could he be guilty of *murder*? I apprehend that he could not: Because the essence of a crime consists in the *animus*, and intention of the committer, considered as a free agent, and in capacity

of distinguishing between moral good and evil. A human creature deprived of reason, and disordered in his senses, is still an animal, or instrument possessing strength and ability to commit violence; but he is no more so than a mere mechanical machine, which, when put in motion, performs its powerful operations on all that comes in its way, without consciousness of its own effects, or responsibility for them. In like manner, the man under the influence of real madness, has properly no will, but does what he is not conscious or sensible he is doing, and therefore cannot be made answerable for any consequences. On this ground, I am clearly of opinion, that the pannel is not an object of punishment, and that he must be absolved from the charge of murder, for which he has been tried by a most intelligent and respectable Jury of his country, whose verdict necessarily imports such an acquittal.

But, should your Lordships agree with me in that opinion, it will not altogether exhaust or terminate the business; circumstanced as it is. Your Lordships have further to discharge the duty you owe to the country, or to the people, by taking such precautions for their future safety against similar violences, as your wisdom may direct, and to which your powers are undoubtedly adequate. The unfortunate Gentleman at the Bar, has unhappily been, while in a state of insanity, the instrument of depriving society of one most valuable member. The verdict, in so finding, proves too well what horrid effects may flow from the depravation of reason in a person living at large: and the proof, which was adduced on the part of the pannel, likewise shows, that, during years preceding the fatal event, he was in various degrees, and at different periods, labouring under the same kind of mental disorder, and even that (according to the observation of some witnesses,) it had occasionally attacked him since his late confinement. God, then only knows what might be the dreadful consequences of his enlargement, and being suffered again to mix with the rest of mankind. It is your Lordships duty to prevent, as far as you can, a possibility



ibility of any person's suffering injury by that means : and the various adjudged cases standing in your records, well known both to the Judges, and the counsel, where the insanity of the perpetrator at the time of the act was found sufficient to exeeem from punishment, do all shew, that your Lordships, and your predecessors, have, in every such case, pronounced that kind of judgement, which, where I now sit, it is incumbent on me to suggest.

I beg leave, therefore, to propose, that, while your Lordships assaillzie the pannel from the indictment for the crime of Murder, you shall ordain him to be carried from the bar, back to the Tolbooth of Edinburgh, and grant warrant to the Magistrates of Edinburgh, therein to receive and detain him during all the days of his life ; but under this condition and exception, that, in case sufficient caution to the satisfaction of this Court, shall be found asted in the Books of Adjournal thereof, under the penalty of *Ten Thousand Pounds Sterling*, that the pannel shall be otherwise kept in sure and safe custody, during his life, the Magistrates, upon such caution being so found, shall be authorised to deliver over the person of the pannel, into the hands and custody of such of his friends as may have given that security, who will, of course, be entitled to receive and detain him in custody accordingly,

*Lord Swinton.* The verdict has left no room for any difference of opinion in the Court.—It has found the prisoner insane, and deprived of his reason at the time of this fatal deed,—and therefore not guilty of the murder libelled. A person in the predicament stated by the verdict is unconscious of the difference between moralgood and evil, and is not an object of punishment. Punishment is intended for example ; but a person insane can have no design ; and to punish him can be no example. The sentence of the Court, must, therefore, acquit the prisoner from this charge.

But, after this is done another duty remains upon the Court. It is a duty not only to punish, but to prevent all manner of evil. The same verdict, which finds the prisoner not guilty of murder, finds it proved that he was the

the instrument of his brother's death. Hence it is to be presumed, that the same disease, which excited him to that fatal action, may recur, and be dangerous to other people. This we must prevent: and I therefore concur with the proposal made by Lord Eskgrove, that the prisoner should be confined for life in the manner that has been stated. It is following the course observed by the Court in the like cases of Spence, Coalston and Blair, whose furious fits were fatal to the lives of other people.

*Lord Dunfinnan.* The melancholy event which gave occasion to this trial, was accompanied, as appears from the verdict of the Jury, with no guilt upon the part of the pannel; and therefore can be the subject of no punishment; yet it was of such a nature, as renders it the indispensable duty of the court, in pronouncing judgement upon this verdict, to take such measures as may afford full security to the public against any risk of the same sort in time coming, in case, at any future period, this unfortunate gentleman, should by the visitation of heaven, be again brought into the deplorable state of becoming unconscious of what he does, and consequently not accountable for his actions. The plan, which has been proposed, appears to be entirely adequate to that object, and therefore has my concurrence.

*Lord Craig* concurred with the opinions delivered, and thought the judgement, which had been suggested, well adapted to the end in view.—And, *Lord Justice Clerk* having expressed himself to the same effect, the Clerk of Court proceeded to write out the judgement as follows.

## THE JUDGEMENT.

15th of July, 1795.

The Lord Justice Clerk, and Lords Commissioners of Justiciary having considered the verdict of Assize, dated and returned the 30th day of June last, in the trial of the

said Sir Archibald Gordon Kinloch, pannel, whereby the affize, all in one voice, find it proven that the pannel killed the deceased Sir Francis Kinloch of Gilmerton Ba- his brother-german, in the way and manner above mentioned in the indictment; but find it proven, that, at that time, the pannel was insane and deprived of his reason: The said Lords, in respect of the said verdict, Find, that the said Sir Archibald Gordon Kinloch, is not an object of punishment, and therefore absolve him *simpliciter*: But, in respect of the insanity and deprivation of reason found proven, the said Lords decern and adjudge the said Sir Archibald Gordon Kinloch, to be carried from the bar, back to the tolbooth of Edinburgh, therein to be detained and confined prisoner during all the days of his life; or at least, ay and until he is delivered to any friend or other person finding caution in manner aftermentioned: and the said Lords grant warrant to, and ordain the Magistrates of Edinburgh, and keepers of their tolbooth, to deliver over the person of the said Sir Archibald Gordon Kinloch, to such friend or other person who shall find sufficient caution and surety acted in the books of adjournal, to the satisfaction of this Court, to secure and confine him in sure and safe custody, during all the days of his life, and that under the penalty of L. 10,000 Sterling; and, in the meantime, ordain the Magistrates of Edinburgh, and keepers of their tolbooth, to receive and detain him prisoner, in terms of, and agreeable to the above sentence, as they shall be answerable on their highest peril.

ROBERT M<sup>C</sup>QUEEN, J. P. D.

This judgement having been subscribed, and read, the prisoner retired from the bar.

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#### CERTIFICATE OF CAUTION

*being found in terms of the Judgement.*

I ROBERT M<sup>C</sup>QUEEN of Braxfield, Lord Justice Clerk,  
hereby

hereby certify, That Doctor William Farquharson, one of the Members of the Royal College of Surgeons in the city of Edinburgh, has found sufficient caution and surety, acted in the Books of Adjournal of the High Court of Justiciary, That he shall secure and confine Sir Archibald Gordon-Kinloch of Gilmerton, now prisoner in the tolbooth of Edinburgh, in sure and safe custody, during all the days of his life, in terms of, and conform to the sentence of the said Court in all points, pronounced against him upon the 15th day of July current. Witness my hand, this 17th day of July 1795.

ROBERT M<sup>c</sup>QUEEN.

In consequence of this certificate, Sir Archibald was removed from prison on Friday the 17th of July 1795.

LIST



LIST of the WITNESSES cited on both Sides,  
*of whom only those marked thus \* were examined.*

———— WITNESSES for the CROWN,  
*of whom those marked thus † were likewise cited for the  
 pannel.*

1. Alexander Kinloch, Esq; son of the deceased Sir David Kinloch of Gilmerton, Baronet.†
- \*2. Walter Gibson servant to the said Alexander Kinloch.†
- \*3. Alexander Menie, sometime butler to the deceased Sir Francis Kinloch of Gilmerton, now residing in Edinburgh.†
- \*4. George Douglas, servant to Miss Kinloch, daughter of the deceased Sir David Kinloch of Gilmerton, Baronet.†
- \*5. Alexander Campbell, lately postillion at Gilmerton, now servant to James Drummond, Esq; of Perth.†
- \*6. William Reid Gardner at Gilmerton.†
7. William Temple chaise-driver in Haddington.†
- \*8. Dr Alexander Monro Physician in Edinburch.†
9. Dr Francis Home physician in Edinburgh.†
- \*10. Dr James Home physician in Edinburgh.†
- \*11. Mr Benjamin Bell surgeon in Edinburgh.†
- \*12. Dr William Farquharson surgeon in Edinburgh.†
- \*13. Mr George Somner surgeon in Haddington.†
- \*14. Alexander Frazer Sheriff-clerk to the county of Haddington.†
- \*15. Hugh Dods clerk to the said Alexander Frazer.
- \*16. Duncan M'Millan writer in Edinburgh.†
- \*17. Mr Charles Hay advocate.
- \*18 The Rev. Mr George Goldie minister of the Gospel at Athelstoneford.†
- \*19. John Walker tenant in Beauford.†
20. James Clerk, Esq; Sheriff-depute of the County of Edinburgh.
21. Joseph Mack writer in Edinburgh.

22. William

22. William Scott Procurator-fiscal of the County of Edinburgh.
23. William Stephens Sheriff-officer in Edinburgh.
24. William Dumbreck hotel keeper, in St. Andrew's Square, Edinburgh.†
25. William Graham waiter to the said William Dumbreck.†
26. Charles Manderson postilion to the said William Dumbreck.†
27. James Robertson keeper of the Black Bull Inn, Edinburgh.
28. Patrick Lee vintner in Edinburgh.†
29. Alexander Murker waiter to the said Patrick Lee.†
30. Mr Alexander Hislop Provost of Haddington.
31. Mr Thomas Fairbairn Sheriff-substitute of the Shire of Haddington.†
- \*32. Hay Smith writer in Haddington.
33. James Stormonth writer in Edinburgh.†
34. Patrick or Peter Dickson, sometime coachman to the late Sir David Kinloch of Gilmerton, Baronet.†
35. Margaret Muir residenter in Haddington.†
36. James Robertson keeper of Edinburgh Jail.
37. Alexander Goodwin inner-keeper of said Jail.
38. James Laing, jun. writer in Edinburgh.
39. Mr Richard Somner surgeon in Haddington.

WITNESSES cited for the Pannel only.

- \*1. Miss Janet Kinloch, daughter of the deceased Sir David Kinloch.
- \*2. Lieutenant Colonel Samuel Twentymen.
- \*3. Captain Henry Miller of the Staffordshire Militia.
- \*4. Major John Mackay.
5. Mr Francis Anderson writer to the Signet.
6. Mr Alexander Low tenant at Woodend.
7. John Reid master of old Slaughters coffee-house, St. Martin's-Lane, London.

S. John

8. John Parsons hairdresser, No. 8. Little Suffolk Street London.
9. Margaret Curtis widow of Michael Curtis occasionally servant to the pannel.
10. William Urquhart perfumer and hairdresser, No. 4. Panton Street, Haymarket London.
11. Mrs Margaret Hay his mother in law.
12. Alexander Urquhart green grocer London.
13. John Johnston grieve at Gilmerton.
14. Jane Logie chamber-maid at walkers hotel, Prince's Street Edinburgh.
15. Robert Dickson postilion to Mrs Fairbairn at Haddington.
16. Henry Gibson waiter to Mr Lerimer Dunbar.
17. William Turnbull postilion to Mr Frazer at Dunbar.
18. Elizabeth MacDougal hen wife at Gilmerton.
19. William Sandie driver of the Haddington coach.
20. Thomas Temple, hostler to Mrs Fairbairn Haddington.
21. William Moffat Forrester at Gilmerton.
22. David Hunter labourer at Gilmerton.
23. Alexander Ferguson labourer there.
24. Francis Buchan wright North Berwick. And
25. The Reverend Dr. David Johnston minister of the gospel at North Leith.

FINIS.

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